Supreme Court, U.S.
FILED

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No. _____

In the
Supreme Court of the United States
October Term, 1994

Harold E. Adamson, et.al.,

Petitioners,

v.

Armco, Inc.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court adopt ERISA's breach of fiduciary duty statute of limitations (ERISA § 413, 29 U.S.C. § 1113) as the statute of limitations to be applied to benefit claims and claims for other relief under ERISA § 502(a), 29 U.S.C. § 1132(a), when it clearly provides a closer analogy than the available state statutes, and the federal policies at stake and the practicalities of litigation under ERISA make it a significantly more appropriate vehicle for interstitial lawmaking under the doctrine established in Del Costello v. Teamsters, 462 U.S. 151 (1983) and Lampf, Pleva, Lipkind, et al. v. Gilbertson, 501 U.S. 350 (1991)?

2. Should the Court's reasoning in Owens v. Okure, 488 U.S. 235 (1989) be applied to borrow the state's "residual" or general contract statute of limitations as the most analogous statute of limitations for claims arising under ERISA § 502(a), 29 U.S.C. § 1132(a), where utilization of more specific statutes of limitations has resulted in confusion, inconsistency, uncertainty, and excessive and unnecessary litigation?

3. Is it proper to utilize a state's two year statute of limitations for wage claims to deny retirees standing to assert breach of fiduciary duty claims against an "alter ego" entity that is a fiduciary but is not their employer or a named plan sponsor, even though the specific federal statute of limitations applicable to breach of fiduciary duty claims has not expired?

LIST OF PARTIES PURSUANT TO RULE 14.1(b)

The Petitioners are as follows:

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and on behalf of Benjamin L. Aho,
deceased former employee,
Donald L. Akervik,
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and on behalf of Frank E. Alborn,
deceased former employee,
Margaret A. Allen, individually
and on behalf of Robert O. Allen,
deceased former employee,
Charles L. Allie,
Donald W. Aluni,
Marion L. Alvar, individually
and on behalf of Carl E. Alvar,
deceased former employee,
Dennis H. Ambuehl,
Narcisa Amitrano, individually
and on behalf of John A. Amitrano,
deceased former employee,
Adine M. Anderson, individually
and on behalf of Orville H. Anderson,
deceased former employee,
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Bradley E. Anderson,
David I. Anderson,
Gerald V. Anderson,
Verner E. Anderson,
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Walter A. Anzinger,
Mildred M. Apuli, individually
and on behalf of Wayne E. Apuli,
deceased former employee,
Margaret J. Asplund, individually
and on behalf of Arthur F. Asplund,
deceased former employee,
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Richard E. Bailey,
Joyce M. Baird, individually
and on behalf of Wayne L. Baird,
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Stanley H. Barnes,
Mathew J. Baudek,
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Lee F. Benoit,
Myrna L. Benoit,
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Margaret M. Benson,
Stanley L. Benson,
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deceased former employee,
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and on behalf of Henry R. Blanchard,
deceased former employee,
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William Boitz,
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Axel Carlson,
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and on behalf of William J. Carlson,
deceased former employee,
Douglas E. Carlson,
Grace E. Carlson, individually
and on behalf of Melvin P. Carlson,
deceased former employee,
Helen B. Carlson, individually
and on behalf of Henning A. Carlson,
deceased former employee,
Robert E. Carlson,
Roy C. Carlson,

Stanley E. Carlson,
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deceased former employee,
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and on behalf of Dale H. Halverson,
deceased former employee,
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and on behalf of Lawrence Kachmarzinski,
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deceased former employee,
Mary L. Smith, individually
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Roger Spencer,
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Allen Thorngren,
James Tokarczyk,

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Dale Uren,
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and on behalf of Harold Vadnais,
deceased former employee,
Franklin R. Vake,
Ray Van Den Heuvel,
George J. Velcheff,
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and on behalf of Donald J. Velcheff,
deceased former employee,
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deceased former employee,
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William A. Zimmerman.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

Harold E. Adamson, et.al.,

Petitioners,

v.

Armco, Inc.,

Respondent.

Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Harold E. Adamson, et al. (collectively "Petitioners"), hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 44 F.3d 650 and is included in the Appendix at A-1 - A-10 . The Order of the Court of Appeals denying rehearing is not reported and is included in the Appendix at A-11. The Order and Memorandum

of the District Court dismissing Petitioners' Complaint with leave to amend is not reported and is included in the Appendix at A-12 - A-27. The Order and Memorandum of the District Court dismissing Petitioners' Amended Complaint is not reported and is included in the Appendix at A-28 - A-36.

JURISDICTION

The decision of the Court of Appeals was entered on January 5, 1995. On March 24, 1995, the Court of Appeals denied Petitioners' Petition for Rehearing With a Suggestion for Rehearing En Banc. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES

ERISA § 413, 29 U.S.C. § 1113:

> No action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of--
>
> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;

except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

ERISA § 502(a), 29 U.S.C. § 1132(a):

(a) Persons empowered to bring a civil action. A civil action may be brought –

(1) by a participant or beneficiary–

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 (29 U.S.C. § 1109);

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations; or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) (29 U.S.C.. § 1025(c));

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (1).

Minn. Stat. § 541.05, subd. 1(1):

Subdivision 1. Except where the uniform commercial code otherwise prescribes, the following actions shall be commenced within six years:

(1) Upon a contract or other obligation, express or implied, as to which no other limitation is expressly prescribed;

Minn. Stat. § 541.07(5):

Except where the Uniform Commercial Code, this section, section 148A.06, or section 541.073 otherwise prescribes, the following actions shall be commenced within two years:

* * *

(5) for the recovery of wages or overtime or damages, fees or penalties accruing under any federal or state law respecting the payment of wages or overtime or damages, fees or penalties except, that if the employer fails to submit payroll records by a specified date upon request of the department of

labor and industry or if the nonpayment is willful and not the result of mistake or inadvertence, the limitation is three years. (The term "wages" means all remuneration for services or employment, including commissions and bonuses and the cash value of all remuneration in any medium other than cash, where the relationship of master and servant exists and the term "damages" means single, double, or treble damages, accorded by any statutory cause of action whatsoever and whether or not the relationship of master and servant exists);

STATEMENT

A. Factual Background.

Petitioners are 487 retirees and former salaried employees of Reserve Mining Company ("Reserve"). They were at all material times participants or beneficiaries under one or more of the employee benefit plans established by Reserve. Although several employee benefit plans are at issue, the primary claims relate to the retiree health insurance plans which are ERISA welfare benefit plans established for former salaried employees and/or their surviving spouses. For purposes of this petition, the Respondent (hereinafter "Armco" or the "Respondent") has conceded that it is a fiduciary under ERISA, and that the Petitioners' benefits are vested. The proceedings below affirmed an Order dismissing Petitioners' Complaints under Fed. R. Civ. P. 12(b) which requires that all factual allegations be taken as true. Therefore, for purposes of this Petition, the Respondent should also be deemed to have breached its fiduciary duty as a fiduciary under these plans.

Reserve filed a Petition for Relief under Chapter 11 of the Bankruptcy Code on August 7, 1986. The employee benefit plans at issue ceased paying benefits and ceased to function at or

about this time. The Petitioners commenced this suit against Armco, in July, 1992.

The Petitioners assert that Armco, together with its co-venturer LTV, Inc., so controlled the operations and capital of Reserve, and Reserve's benefit plans, as to be the entity responsible for payment of vested benefits under their plans, and for breach of fiduciary duty in administration of these plans.[1] The original and amended complaints assert that Armco was a fiduciary with respect to the benefit plans because it possessed discretionary authority and control over their management and administration within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). The original complaint also asserts that in addition to this statutory basis for liability, Armco is liable under the common law theory which allows Petitioners to pierce the corporate veil.[2] See United Steelworkers v. Connors Steel Co., 855 F.2d 1499 (11th Cir. 1988).

The degree of control which Armco asserted over Reserve during the time period at issue is described in detail in Minnesota Power v. Armco, Inc., 937 F.2d 1363 (8th Cir. 1991) in which the Eighth Circuit concluded that Armco, its conduit corporate entity First Taconite, and Reserve, were alter-egos of each other and that injustice and fundamental unfairness "permeated" their dealings with the creditor. Minnesota Power, 937 F.2d at 1369.

The Circuit Court's opinion in this case makes no reference to the difficult circumstances confronting Petitioners in asserting their benefit claims against Armco. Petitioners are retirees who had to obtain knowledge of the factual circumstances concerning

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[1] LTV is the successor to Republic Steel Co., whose wholly-owned conduit corporate entity, Republic Reserve was the other 50% partner in Reserve. It is not a party to this action, having filed for protection under Chapter 11 of the Bankruptcy Code in July, 1986.

[2] The District Court Order dismissing the original complaint did not permit the Petitioners to plead this common law theory in their amended complaint.

the relationship between their former employer and Armco, which was the parent corporation of a corporate partner (First Taconite) of their former employer (Reserve), before they could know of the role of Armco in the administration of their benefit plans and know that there was a basis for suit against Armco.

The Eighth Circuit decision erroneously characterizes Armco as the Petitioners' "employer". It ignores the fact that Petitioners' true employer ("Reserve") was bankrupt and that Petitioners had to uncover facts sufficient to enable them to establish a credible claim for liability against a third party corporate entity that is the parent of one of the two corporate partners constituting the Reserve partnership which was their employer. It does not address the fact that as claimants asserting a claim for benefits under ERISA § 502(a)(1)(B), 29 U.S.C. § 132(a)(1)(B) against an entity which controlled their direct employer, they would have to obtain knowledge sufficient to establish that:

(1) The parent and the subsidiary have common stock ownership;

(2) The parent and the subsidiary have common directors or officers;

(3) The parent and the subsidiary have common business departments;

(4) The parent and the subsidiary file consolidated financial statements and tax returns;

(5) The parent finances the subsidiary;

(6) The parent caused the incorporation of the subsidiary;

(7) The subsidiary operates with grossly inadequate capital;

(8) The parent pays the salaries and other expenses of the subsidiary;

(9) The subsidiary receives no business except that given to it by the parent;

(10) The parent uses the subsidiary's property as its own;

(11) The daily operations of the two corporations are not kept separate; and

(12) The subsidiary does not observe the basic corporate formalities, such as keeping separate books and records and holding shareholder and board meetings.

Connors Steel Co., 855 F.2d at 1499 citing United States v. Jon-T. Chemicals, Inc., 768 F.2d 686, 691-92 (5th Cir. 1985).

B. Proceedings Below.

1. District Court.

The jurisdiction of the District Court was invoked under ERISA § 502(a), 29 U.S.C. § 1132(a). The Petitioners' original Complaint was served upon Armco in July, 1992. The original Complaint alleged various claims for benefits against Armco under ERISA § 502(a), 29 U.S.C. § 1132(a); the original complaint asserted liability for benefits as Reserve's "alter ego" under the common law doctrine established in Connors Steel Co., and breach of fiduciary duty claims under ERISA § 404 and

§ 405, 29 U.S.C. § 1104 and § 1105. Even though Armco was not the Petitioners' employer, the District Court found that the benefit claims under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1))B) were subject to Minnesota's two year statute of limitations for wage claims, Minn. Stat. § 541.03, rather than its six year statute of limitations for contract claims, Minn. Stat. § 540.05, subd. 1(1), and therefore dismissed them as untimely. It also dismissed the "alter-ego" claims as untimely. However, it allowed Petitioners to replead the "independent fiduciary" claims under ERISA § 405 and § 409, 29 U.S.C. § 1104 and § 1109. (See Appendix at A-24 - A-26) because such claims would be timely under the separate ERISA six year statute of limitations for breach of fiduciary claims (ERISA §413, 29 U.S.C. § 1113).

The Petitioners then served and filed their first Amended Complaint. The Amended Complaint asserted breach of fiduciary duty claims and sought relief for such breaches under ERISA § 502(a)(2) and (a)(3), 29 U.S.C. § 1132(a)(2) and (a)(3), including a request for equitable relief consisting of reinstatement of the plans under ERISA § 502(a)(3). The District Court dismissed the Petitioners' Amended Complaint. The District Court concluded that since the Petitioners' claims for benefits under ERISA § 502(a)(1)(B) were time barred by Minnesota's two year "wage claim" statute of limitations, they had no "colorable claim to vested benefits" and therefore they were no longer participants or beneficiaries under the plans and had no standing to assert the breach of fiduciary duty claims. Thus, the District Court held that the Minnesota wage claim statute not only barred Petitioners claims for benefits under § 502(a)(1)(B), but, also precluded Petitioners' claims for breach of fiduciary duty and relief therefor under § 502(a)(2) and § 502(a)(3). Additionally, the District Court ruled that the Petitioners were suing on behalf of themselves rather than on behalf of the various plans, and that recovery for a violation of ERISA § 405 or § 409 inures to the benefit of the plans as a whole, rather than to the individual participants, and dismissed the Amended Complaint

because it was not brought by Petitioners in a derivative capacity on behalf of the various plans. (See Appendix at A-34 - A-36).

2. Court of Appeals.

The Petitioners appealed to the Eighth Circuit Court of Appeals. The Court of Appeals affirmed the dismissal of all of Petitioners' claims on the basis that Minnesota's two year statute of limitations precluded the Petitioners' claims for benefits under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), and that since the Petitioners were no longer participants they had no standing to assert any breach of fiduciary duty claims under ERISA §§ 404(a) and 405, 29 U.S.C. §§ 1104(a) and 1105 or to seek a remedy for such breaches of fiduciary duty under ERISA §§ 502(a)(2) and (a)(3), 29 U.S.C. §§ 1132(a)(2) and (a)(3). The Court of Appeals did not address the issues of whether relief was directly available to Petitioners as opposed to the plans, under ERISA § 502(a)(2) and § 502(a)(3) or the issue concerning whether Petitioners claims under ERISA § 502(a)(3) for reinstatement of the plans constituted a claim for traditional equitable relief. (See Appendix A-7 - A-8).

In concluding that Petitioners, as "ex participants", no longer had standing to assert any claims, the Court of Appeals had to distinguish its recent decision in Howe v. Varity Corp., 36 F.3d 746 (8th Cir. 1994), cert. granted, 63 U.S.L.W. 3771 (U.S. Apr. 24, 1995) (No. 94-1471), which was issued subsequent to the District Court's decision in this case. In Howe, the Eighth Circuit allowed former participants to assert claims for breach of fiduciary duty against their former employer (which had "spun off" its vastly undercapitalized subsidiary, their current employer). The Court of Appeals distinguished Howe by noting that the issue of standing of non-participants had not been raised by the parties in Howe, and that in any event, the former participants in Howe fell within an exception to the requirement that the plaintiff be a current participant because they lost their participant status due to

the fiduciary's or employer's conduct.[3] The Court of Appeals failed to address whether Armco's conduct in continuing to successfully disguise its role in the operations of the Petitioners' plan sponsor, and the Petitioners need to establish Armco's unfair conduct or fundamental unfairness in dealing with them under the "corporate veil piercing" doctrine would trigger the exception to the current participant requirement. The Court of Appeals simply states that Petitioners relinquished their participant status through "inaction" and fails to recognize that any "inaction" resulted from Armco's continuing concealment of the nature of its relationship with Reserve.

Since the Court of Appeals determined that Petitioners lacked standing to assert any breach of fiduciary duty claims, it did not address the Petitioners' entitlement to equitable relief under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), consisting of reinstatement of their retiree health insurance and restitution for benefits previously not paid. The Howe court allowed the former plan participants to utilize ERISA § 502(a)(3) to obtain identical relief for their employer's breach of fiduciary duty, noting that acceptance of the employer's argument that relief under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) could inure only to the plan and not the individual participants would result in leaving an egregious wrong unredressed.

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[3] There is a split among the Circuits regarding whether former participants have standing to assert such claims. See Christopher v. Mobil Oil Corp., 950 F.2d 1209, 1221 (5th Cir. 1992); cert. denied, 113 S. Ct. 68 (1992); accord Mullins v. Pfizer, Inc., 23 F.3d 663, 666-68 (2nd Cir. 1994); Vartanian v. Monsanto Co., 14 F.3d 697, 700-01 (1st Cir. 1994). But see Raymond v. Mobil Oil Corp., 983 F.2d 1528, 1536 (10th Cir. 1993) cert. denied, 114 S. Ct. 891 (1993).

REASONS FOR GRANTING PETITION

QUESTION 1

In Del Costello v. Teamsters, 462 U.S. 151 (1983), this Court recognized an exception to the general rule that statutes of limitations are to be borrowed from state law where the federal statute in question contains no express statute of limitations. This Court declines to borrow a state statute of limitations "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial law making." Del Costello, 462 U.S. at 172. The Court's majority opinion in Lampf, Pleva, Lipkind, et. al, v. Gilbertson, 501 U.S. 350 (1991) set forth a hierarchical inquiry for ascertaining the appropriate limitations period for a federal cause of action where Congress has not set the time within which such a cause of action must be brought.

The first step of the Lampf inquiry is to determine whether a uniform statute of limitations is appropriate. The Eighth Circuit's experience in selecting the most appropriate state statute of limitations demonstrates the need for a uniform federal statute of limitations for actions brought under ERISA § 502(a), 29 U.S.C. § 1132(a). See Todd M. Worscheck, Note, Eighth Circuit Struggles to Select Appropriate Statute of Limitations for ERISA Claims: Difficulties With a Straightforward Matter, 18 Wm. Mitchell L. Rev. 861 (1992). In Johnson v. State of Mutual Life Assurance Co. of America, 942 F.2d 1200 (8th Cir. 1991) (en banc), a 5/4 majority of the Eighth Circuit overruled its earlier decision in Fogerty v. Metropolitan Life Insurance Co., 850 F.2d 430 (8th Cir. 1988). Both cases involved the question of whether an ERISA claim based upon a life insurance policy was subject to Missouri's five-year residual or general statute of limitations for breach of contract or a more specific ten-year statute of

limitations for claims based upon written contracts to pay money. The Fogerty panel held that an insurance policy was not a contract to pay money. Subsequently, the Johnson majority determined that it was, expressly overruling Fogerty.

The panel in the instant case claimed to follow the Johnson Court's rationale and concluded that Minnesota's two-year statute of limitations for "wage claims" was a more specific contract statute of limitations than Minnesota's six-year residual general contract statute of limitations, and applied the two-year wage claim statute of limitations to bar all claims. However, the Eighth Circuit has also concluded that where trustees of a pension fund were seeking delinquent contributions under ERISA § 502(a), 29 U.S.C. § 1132(a), the appropriate statute of limitations was Iowa's general ten-year statute of limitations for breach of written contract rather than it's more specific two-year statute of limitations for recovery of "wages". The Eighth Circuit made the Robbins decision in the face of a specific statutory definition that defined "wages" to include "employer contribution to employee benefit funds" Robbins v. Iowa Road Builders Co., 828 F.2d 1348, 1354 (8th Cir. 1987), cert. denied, 487 U.S. 1234 (1988). The Robbins Court found the two-year statute of limitations to be inconsistent with the federal policies behind ERISA, noting that the trustees might not discover underpayment of the contributions until years after the employment relationships had ended or until they had conducted an audit. Robbins, 828 F.2d at 1354. The retirees in this case were confronted with a bankrupt partnership that was their employer, bankrupt corporate partners of their employer, and needed time to discover facts which could form the basis for a claim against the parent company of one of the corporate bankrupt partners as their employer's alter ego.[4]

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[4] It is anticipated that the Respondent will assert that Petitioners alleged in their pleadings that Armco was their "employer", just as the Court of Appeals incorrectly stated that Appellants alleged that Armco is an "employer". See App. A-2. A fair reading of the Complaint is that Petitioners have alleged that while Armco is not their employer, it should be treated as

Adoption of the two-year statute of limitations under these circumstances is essentially contrary to the Eighth Circuit's rationale in Robbins in that it erects precisely the type of procedural and jurisdictional barrier to recovery which ERISA was intended to eliminate.[5] The Eighth Circuit decisions in Johnson, Fogerty, Robbins and this case illustrate the need for a uniform statute of limitations. Inconsistencies among and within the various circuits in borrowing statutes of limitations support this conclusion. (See Worscheck, supra, at 872-73, nn. 62-63).

Under the second step of the Lampf inquiry, the geographical character of the claim influences whether the limitations period should be derived from a state or federal source. ERISA's broad venue provisions provide that an action "may be brought in the district court where the plan is administered, where the breach

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their employer for purposes of liability to the Petitioners, because of its control over the operations and capital of Reserve. Petitioners' also allege that Armco has liability as an employer under the definition of an "Employer" found at ERISA § 3(5), 29 U.S.C. § 1002(5) which includes: "a person acting . . . indirectly in the interest of an employer, in relation to an employee benefit plan." The Court of Appeals' characterization of Armco as an "employer" rather than recognition of the facts which Petitioners must establish to assert a claim against Armco as their employer's "alter-ego" resulted in inadequate consideration of the second inquiry required under Wilson v. Garcia, 471 U.S. 261 (1985) whether application of a two year statute of limitations in this factual setting is inconsistent with federal law and the policies embodied in ERISA.

[5] The Eighth Circuit stated that "Appellants cite no case in which a closely analogous state statute of limitations has been rejected simply because it was too short." See Appendix at A-5. Appellants believe that a fair reading of Robbins yields the conclusion that the two year statute of limitations was so short as to hinder the federal policies behind ERISA under the facts present. Additionally, Appellants directed the Eighth Circuit's attention to Trustees of Health Benefits Trust v. Lillard & Clark, 780 F. Supp. 738 (D. Colo. 1990), where apart from perceiving a discrimination against federal statutory causes of action the court noted that under the circumstances there present, application of a two-year statute of limitations would hinder the federal policies behind ERISA. Lillard & Clark, 780 F. Supp. at 741.

took place or where a defendant resides or may be found." See ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2). Civil enforcement actions may be filed in either a state court of competent jurisdiction or in federal court. See ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1). The state court proceeding can be removed to federal court, which is exactly what the defendant insurer did in Johnson, hoping to have the federal court follow Fogerty as binding precedent, rather than facing the uncertainties arising from the two parallel inconsistent lines of precedent found in Missouri case law. The multi-state nature of ERISA indicates the desirability of a uniform federal statute of limitations.[6] With the possibility of multiple state limitations, the use of state statutes presents the danger of forum shopping and virtually guarantees complex time-consuming and expensive litigation over what should be a straight forward matter. This uncertainty has real world consequences to both plaintiffs and defendants in an ERISA action. Plaintiffs such as the retirees in this case have expended considerable resources and have been denied a just remedy because they wrongly postulated that the Eighth Circuit would apply the reasoning of Robbins and reject a more specific wage claim statute of limitations in favor of a longer residuary contract statute of limitations where the retirees were not suing their employer and needed a significant period of time to uncover complex facts which would justify a claim for ERISA benefits against a third party alter ego. This lack of uniformity also adversely affects Defendants. Defendant's cannot calculate their

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[6] This is in contrast to the Worker Adjustment and Retraining Notification Act (WARN act) (29 U.S.C. §2101, et. seq.) in which this Court recently declined to adopt a uniform statute of limitations based upon federal law. See North Star Steel Co. v. Thomas, 63 U.S.L.W. 4465 (U.S. May 30, 1995) (No. 94-834). ERISA is more closely analogous to the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. § 1961 et. seq.)for which this Court has adopted a uniform statute of limitations borrowed from another federal statute. See Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143 (1987).

contingent liabilities, not knowing with confidence when their delicts lie in repose. Wilson v. Garcia, 471 U.S. 261, 275 n.34 (1985). Moreover, application of a uniform federal limitations period avoids the possibility of the application of unduly short state statutes of limitations that would thwart the legislative purpose of creating an effective remedy (See supra, f.nn. 4 and 5).

The last step of the Lampf inquiry requires a finding that an analogous federal source truly affords a closer fit with the cause of action than any available state law source. Lampf, 501 U.S. at 357. Here, the most obvious federal source is ERISA itself, which contains an express limitations period for enforcement of fiduciary responsibilities, ERISA § 413(a), 29 U.S.C. § 1113(a).

The enforcement of fiduciary responsibilities and ERISA's express remedial provisions to enforce participant rights are comparable in their related protections (See Worscheck, supra at 885). The purpose of both provisions is the protection of the interests of participants in employee benefit plans. Congress's implicit balance of policy considerations in enacting the express limitations provision for enforcement of fiduciary responsibility applies with equal force to actions brought under ERISA § 502(a), 29 U.S.C. § 1132(a) to enforce participants rights under a benefit plan. (See Worscheck, supra at 885).

The Tenth Circuit, although believing it was compelled to follow its precedent and apply the most analogous state statute, has noted that a claim for benefits under ERISA § 502(a)(1)(B), 11 U.S.C. § 1132 (a)(1)(B) provides an ideal context for considering whether adoption of ERISA's express statute of limitations for breach of fiduciary claims makes more sense than searching for an analogous state statute as a bar to claims under ERISA § 502(a). Held v. Manufacturers Hanover Leasing Corp. 912 F.2d 1197, 1200 (10th Cir. 1990). On two occasions the Third Circuit has applied ERISA's statute of limitations for breach of fiduciary duty to ERISA claims rather than a statute of limitations under the National Labor Relations Act or a state statute of limitations applicable to disputed arbitration awards.

Edwards v. Wilkes-Barre Publishing Co., Pension Trust, 757 F.2d 52, 54 (3rd Cir. 1985) cert. denied, 474 U.S. 843 (1985); Adams v. Gould, Inc., 739 F.2d 858, 867 (3rd Cir. 1984) cert. denied, 469 U.S. 1122 (1985). ERISA was intended to provide a uniform national civil enforcement system to regulate employee benefit plans through the adoption of a comprehensive scheme of federal laws relating to both benefit claims and fiduciary responsibility. Although this court has cautioned that the "states borrowing doctrine" should not be lightly abandoned, fulfillment of ERISA's goals, the danger of forum shopping, and the interests of uniformity, predictability and judicial economy dictate that ERISA's express limitations period should be borrowed for application to claims under ERISA § 502(a), 29 U.S.C. § 1132(a). (See Worscheck, supra at 886).

QUESTION 2

In the event that this court determines that ERISA's statute of limitations for enforcement of fiduciary responsibilities should not be adopted as the statute of limitations for ERISA benefit claims, this court should establish a state's residual or general statute of limitations for actions based upon contract as the state statute of limitations to be borrowed for ERISA benefit claims. Although this approach would not eliminate the risk of forum shopping, it would greatly reduce the uncertainty, inconsistency, confusion and complex unnecessary litigation arising from the search for the most specific analogous state statute of limitations. Furthermore, it would provide a limitations period that strikes an appropriate balance between the need to afford plaintiffs an adequate opportunity to enforce the rights bestowed them under ERISA, and the defendant's need for a definite, timely period of repose.

The overwhelming majority of the Circuit Courts have concluded that a claim under ERISA § 502(a), 29 U.S.C. § 1132(a) is to be characterized as a contract action for statute of

limitations purposes, and have applied the forum state's general or residuary statute of limitations regarding claims based upon a contract. See Miles v. New York State Teamsters Conference Pension and Retirement Fund Employee Pension Benefit Plan, 698 F.2d 593 (2d. Cir. 1983); Dameron v. Sinai Hosp. of Baltimore, Inc., 815 F.2d 975 (4th Cir. 1987); Hogan v. Kraft Foods, 969 F.2d 142 (5th Cir. 1992); Central States, Southeast and Southwest Areas Pension Fund v. Kraftco, Inc., 799 F.2d 1098 (6th Cir. 1986); Meade v. Pension Appeals and Review Comm., 966 F.2d 190 (6th Cir. 1992); Jenkins v. Local 705 Int'l Broth. of Teamsters, 713 F.2d 247 (7th Cir. 1983); Hawaii Carpenters Trust Funds v. Waiola Carpenter Shop, Inc., 823 F.2d 289 (9th Cir. 1987); and Wright v. Southwestern Bell Tel. Co., 925 F.2d 1288 (10th Cir. 1991).

The Third, Eleventh and Eighth Circuits have not applied the forum state's general or residuary statute of limitations regarding claims based upon a contract in determining whether claims under ERISA § 502(a), 29 U.S.C. § 1132(a) are time-barred. But in each of these three Circuits, serious qualifications should be noted.

The Third Circuit adopted the statute of limitations governing actions to recover wages as the appropriate limitations period in Teamsters Pension Trust Fund v. John Tinney Delivery Service, Inc., 732 F.2d 319 (3rd Cir. 1984), but also noted that the issue should perhaps be reconsidered in light of the fact that every other Court of Appeals has applied the statute of limitations for breach of contract to suits brought under 29 U.S.C. § 1132(a)(1)(B).[7] Vernau v. Vic's Market, Inc., 896 F.2d 43 (3rd Cir. 1990).

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[7] In Vernau, the court noted that first "every court of appeals save ours", has applied the forum statute of limitations applicable to breach of contract actions. Second, it noted that the Supreme Court itself had characterized pension claims as an action for breach of contract rather than an action to recover wages, citing Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559 (1985); finally it noted that

The 11th Circuit has apparently divided the issue into two components. It has concluded that a claim for past benefits is one relating to enforcement of statutory rights, which resulted in a two-year limitation period for recovery of past benefits as "wages", however, this Circuit also found that a twenty year limitation period for equitable enforcement of statutory rights was appropriate where a party seeks future benefits in requesting reinstatement in a benefit plan. Clark v. Coats and Clark, Inc., 865 F.2d 1237 (11th Cir. 1989).[8] Accordingly, the Eleventh Circuit reversed the trial court's application of the forum state's wage recovery statute to bar claims for future benefits. Clark, 865 F.2d at 1242.

The Eighth Circuit utilized the state's general contract statute of limitations in Robbins, but in overruling Fogerty, it determined to select the most specific contract statute of limitations over the

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because the Pension Benefit Guaranty Corporation is ultimately liable to pay certain benefit obligations that the federal government has a strong interest in seeing that a lengthy statute of limitations period is imposed. Tinney and the Third Circuit's decisions which follow it, make no reference to the Third Circuit cases which utilize ERISA § 413, 29 U.S.C. § 1113 as the appropriate statute of limitations for ERISA claims. See Edwards v. Wilkes-Barre Publishing Co., and Adams v. Gould, Inc., supra.

[8] Petitioners argued to both the District Court and Court of Appeals that as an alternative to Minnesota's six year general contract statute of limitations, the Court should apply Minn. Stat. § 541.05, subd. 1(2) which establishes a six year limitations period for claims based "upon a liability created by statute other than those arising upon a penalty or forfeiture." This is the Minnesota statute of limitations which is most analogous to that selected by the Eleventh Circuit in Clark. If this Court agrees that a uniform characterization of these claims is necessary, Petitioners do not believe that statutes of limitations addressing causes of action based upon a statute should be adopted by this Court as the most analogous state statute of limitations because the time period afforded under this statute of limitations varies greatly among the states. Furthermore, some courts have interpreted such statute of limitations to apply only where the cause of action was unknown or unavailable under the common law, and other courts have not so limited the applicability of such statutes of limitations.

general residual contract statute of limitations. See Johnson, supra.

Comparison of these Circuit Court decisions, and the inconsistencies resulting from the Eighth Circuit and Eleventh Circuit approach of searching for the most specifically analogous contract statute of limitations shows why the better approach is that followed by the majority of the Circuits: simply characterize ERISA claims arising under 29 U.S.C. § 1132(a) as contract claims and apply the forum state's general contract statute of limitations. Authority for this approach is found in Owens v. Okure, 488 U.S. 235 (1989), and Reed v. United Transp. Union, 488 U.S. 319 (1989). In Owens, this Court instructed the lower courts to cease the search for the most specifically analogous intentional tort statute of limitations when considering § 1983 claims, and directed them to utilize the general personal injury or residual statute of limitations which include personal injury actions. Owens, 488 U.S.C. at 250. This Court noted that this approach enables plaintiffs and defendants to readily ascertain, with little risk of confusion or unpredictability, the applicable limitations period, and avoids the enormous practical disadvantages which arise from the hunt for the most specifically analogous tort statute of limitations. Likewise, in Reed, this Court determined that all claims brought under § 101(a)(2) of the LMRDA (29 U.S.C. § 411(a)(2)) should be uniformly characterized as subject to the general or residuary state statute of limitations for personal injuries. The confusion, inconsistency, uncertainty and excessive and unnecessary litigation arising from the quest for the most specific state statute of limitations for ERISA claims under 29 U.S.C. § 1132(a) will be greatly reduced if this Court rules that such claims are all subject to the forum state's general or residual statute of limitations for actions based upon contract.

QUESTION 3

In addition to asserting claims for benefits under ERISA § 502(a)(1)(B), 29 U.S.C § 1132(a)(1)(B), the Petitioner's alleged that Armco exercised sufficient discretionary authority and control with respect to the management and administration of their former employer's retiree benefit programs to make it a fiduciary with respect to the plans under 29 U.S.C. § 1002(21)(A). Petitioners alleged that Armco had breached various fiduciary duties, including the duty to continue to provide vested benefits. See Jansen v. Greyhound Corp., 692 F. Supp. 1029 (N.D. Iowa 1987). For purposes of this Petition, it is conceded that Armco is a plan fiduciary and that Petitioners' benefits under the plans were vested. See App. A-7. Because the lower courts dismissed Petitioners' allegations of breach of fiduciary duty under Fed. R. Civ. P. 12(b), this Court may assume that Petitioners have a valid claim against the Respondent for breach of fiduciary duty unless barred by a statute of limitations.

Petitioner sought equitable relief under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), consisting of an order that Armco be required to re-establish each of the benefit programs and provide restitution for benefits that their former employer had failed to provide. The Circuit Court concluded that the Petitioners were no longer "participants" entitled to enforce any remedy under ERISA §§ 502(a)(2) or (a)(3), 29 U.S.C. § 1132(a)(2) or (a)(3), because Petitioners' benefit claims were time-barred under Minnesota's two year wage claim statute of limitations and they therefore no longer had a colorable claim for vested benefits. Thus, the Circuit Court utilized a state statute of limitations to bar benefit claims, to also bar the breach of fiduciary duty claims, despite the fact that the breach of fiduciary duty claims were timely under ERISA's statute of limitations for such claims, ERISA § 413, 29 U.S.C. § 1113.

The Circuit Court's decision cannot be reconciled with ERISA's broad pre-emption provision, 29 U.S.C. § 1144(a).

ERISA comprehensively regulates relationships between fiduciaries and plan members. Integral to that relationship is the regulation of a plan member's litigation rights, including limitations thereof.

Clearly Congress did not intend a state law to be utilized to pre-empt a specific federal statute of limitations for breach of fiduciary duty. Indeed, such a result frustrates not only Congress' purpose in providing a broad based pre-emption clause, but undermines Congressional intent to provide full scale remedies for breach of fiduciary duties without the necessity of subjecting such remedies to the vagaries of state law.

The panel's decision afforded Petitioners only two years in which to assert their breach of fiduciary duty claims. This result is in marked contrast with Congress's intent in enacting ERISA § 413, 29 U.S.C. § 1113. Under ERISA § 413 the only circumstances under which a Plaintiff is afforded a period of less than six years to bring a claim for breach of fiduciary duty is where the defendant can show that the Plaintiff had actual knowledge (not constructive knowledge) of the breach or violation. It is evident that Congress intended that only actual knowledge of the breach or violation should serve to shorten this six-year period. Other ERISA limitation periods do not demand as much. Both ERISA § 4003(e), 29 U.S.C. § 1303(e) and ERISA § 4070(f)(2)(A), 29 U.S.C. § 1370(f)(2)(A) show that Congress knew how to require constructive knowledge. Prior to its amendment in 1987, ERISA § 413 also provided that constructive knowledge was sufficient to shorten the six-year period. The 1987 amendment provided that only actual knowledge was sufficient to shorten the six-year period because Congress was determined to impress upon those vested with control over employee benefit plans the importance of the trust they hold. Congress did not desire that those who violate this position of trust could easily find refuge in a time bar.

The actual knowledge requirement is a rigorous one; it requires that the Plaintiff have actual knowledge of all material

facts necessary to understand that a claim exists. Gluck v. Unisys Corp., 960 F.2d 1168, 1177 (3rd Cir. 1992); Brock v. Nellis, 809 F.2d 753, 755 (11th Cir. 1987), cert. dismissed sub nom., 483 U.S. 1057 (1987). This requires the plaintiff to have knowledge that a claim exists against the defendant in question. It requires that the plaintiff have actual knowledge of a defendant's involvement in the transaction in question and/or knowledge that a defendant is a plan fiduciary. Brock, 809 F.2d at 754; Useden v. Acker, 734 F. Supp. 978, 979-80 (S.D. Fla. 1989) aff'd, 947 F.2d 1563 (11th Cir. 1991), cert. denied, 113 S. Ct. 2927; Fechter v. Connecticut Gen. Life Ins. Co., 800 F. Supp. 178, 181 (E.D. Pa. 1991). The Court of Appeals decision equates a retiree's knowledge of a plan sponsor's failure to perform under its benefits plans with actual knowledge of a third party's breach of a fiduciary duty as an unnamed fiduciary and controlling entity. Mere knowledge of the plan sponsor's bankruptcy filing and inability to satisfy its benefit plan obligations did not afford petitioners with actual knowledge of all material facts necessary to understand that a claim existed against the plan sponsor's alter-ego, as required under ERISA § 413.

The Court of Appeals acknowledged that several circuits have crafted an exception to the requirement that a plaintiff be a current plan participant where the plaintiff has lost his participant status because of the fiduciary's or employer's conduct. See App. A-8. In Howe, a different panel of the Eighth Circuit permitted former plan participants to assert claims for breach of fiduciary duty against their former employer where the former participants sought equitable relief under ERISA § 502(a)(3), virtually identical to that which the Petitioners have sought in this case (i.e., reinstatement of their retiree health insurance plans and restitution for benefits previously not paid.) In Howe, the court concluded that acceptance of the employer's argument that relief under ERISA § 502(a)(3) could inure only to the plan itself, and not the individual plan participants, would result in leaving an egregious wrong unredressed. Howe, 36 F.3d at 755.

Application of Minnesota's two year statute of limitations to bar Petitioner's breach of fiduciary duty claims in this case results in the same type of unredressed egregious wrong. It rewards the Defendant for continuing to successfully disguise its liability for the plan sponsor's health and welfare benefits under the partnership veil and the corporate veil which it created to insulate itself from claims against the plan sponsor.

The Eighth Circuit distinguishes the Howe decision by noting that the plaintiffs' non-participant status in Howe falls within an "exception" because their non-participant status resulted from the employer's wrongdoing. See App. A-8 - A-9. The Court of Appeals dismissal of the claims in this case denies the Petitioners any opportunity to establish the factual basis necessary to determine that this exception should apply. In order to pierce the corporate veil and establish the Respondent's liability, Petitioners will have to establish unfair conduct or fundamental unfairness on the part of the Respondent. Plaintiffs assert that the Respondent's conduct in disguising its role in the operations of the plan sponsor so that Petitioners did not immediately know at the time retirement benefits terminated, that the Respondent, in addition to the employer, would be liable for those benefits, is not significantly different from the corporate defendant's behavior in Howe. The Court of Appeal's application of Minnesota's two year statute of limitations rather than ERISA's express statute of limitations for breach of fiduciary duty claims precludes any effort by Petitioners to make a showing of unfair conduct or fundamental unfairness; a showing which would fall within the "exception" recognized in Howe. The Circuit Court failed to recognize that Petitioner's alleged relinquishment of participant status through "inaction" resulted from the Respondent's concealment of the nature of its relationship with the Petitioner's employer.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 22, 1995

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 93-3860

Harold E. Adamson, et al., *

*

Plaintiffs - Appellants, *

* Appeal from the United States

v. * District Court for the

* District of Minnesota.

Armco, Inc., *

*

Defendant - Appellee. *

Submitted: June 13, 1994

Filed: January 5, 1995

Before BOWMAN, Circuit Judge, WEIS,* Senior Circuit Judge, and LOKEN, Circuit Judge.

LOKEN, Circuit Judge.

For many years, Reserve Mining Company ("Reserve") mined and processed taconite iron ore deposits in northern Minnesota and shipped the processed taconite to steel mills operated by Reserve's parent companies, Republic Steel

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* The HONORABLE JOSEPH F. WEIS, JR., Senior United States Circuit Judge for the Third Circuit, sitting by designation.

Corporation and appellee Armco, Inc. Republic and Armco operated Reserve as a "cost company," paying Reserve's operating expenses as incurred and causing Reserve to have no net earnings. In mid-1986, beset by environmental and economic adversities, Reserve ceased operations and filed a petition for relief under Chapter 11 of the Bankruptcy Code.

Reserve's bankruptcy terminated its unfunded welfare benefit plans. Appellants are 487 former salaried employees and retirees of Reserve who had participated in those plans. They commenced this action in 1992 against Armco, asserting thirty-seven claims under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 et seq. ("ERISA"). The district court[1] dismissed all these claims. This appeal concerns its dismissal of claims for benefits due under the terminated plans as time-barred, and its dismissal of claims for breach of fiduciary duty because appellants as former plan participants lack standing to assert those claims under Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989). We conclude that the district court correctly construed ERISA and the relevant case law and therefore affirm.

I. Claims for Benefits Due

Appellants allege that Armco is an "employer" liable for benefits due under the terms of the unfunded, terminated plans. ERISA expressly provides that "[a] civil action may be brought (1) by a participant or beneficiary . . . (B) to recover benefits due to him under the terms of his plan." § 502 (a)(1)(B), 29 U.S.C. § 1132 (a)(1)(B). The plans stopped paying benefits in 1986. These claims were first asserted in 1992. The district court held the claims time-barred under Minnesota's two-year statute of limitations governing claims

[1] The HONORABLE DONALD D. ALSOP, Senior United States District Judge for the District of Minnesota.

for the recovery of wages and other compensation. Minn. Stat. § 541.07(5). We agree.

ERISA contains no statute of limitations for actions to recover plan benefits. Therefore, as a matter of federal law we must look to Minnesota law for the most analogous state statute of limitations. At least in this circuit, it is settled that a claim for ERISA benefits is characterized as a contract action for statute of limitations purposes. In a State such as Minnesota that has more than one statute of limitations for contract actions, the federal court must decide which statute governs claims that are "most analogous" to the ERISA benefit claims at issue. See Johnson v. State Mut. Life Assur. Co. of America, 942 F.2d 1260, 1261-63 (8th Cir. 1991) (en banc).

Appellants argue that Minnesota's six-year statute of limitations for contracts not falling within a more specific statute should govern. See Minn. Stat. § 541.05(1). The district court instead applied § 541.07(5), the two-year statute of limitations for wage claims, which provides in relevant part:

> [T]he following actions shall be commenced within two years:
>
> * * * * *
>
> (5) For the recovery of wages or overtime or damages, fees or penalties accruing under any federal or state law respecting the payment of wages or overtime or damages, fees or penalties . . . . (The term "wages" means all remuneration for services or employment, including commissions and bonuses and the cash value of all remuneration in any medium other than cash, where the relationship of master and servant exists and the term "damages" means single, double, or treble damages, accorded by any statutory cause of action whatsoever and whether or not the relationship of master and servant exists).

Minnesota courts have applied this statute broadly: "all damages arising out of the employment relationship are subject to the two-year statute of limitations set forth in Minn. Stat. § 541.07(5)." Stowman v. Carlson Cos., 430 N.W.2d 490, 493 (Minn. App. 1988), applying Portlance v. Golden Valley State Bank, 405 N.W.2d 240, 242 (Minn. 1987). Because ERISA preempts all state law claims, Minnesota courts have not had occasion to determine whether claims for employee benefits under an ERISA plan are wage claims governed by § 571.07(5). See Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 52-57 (1987). But the issue is hardly in doubt. For example, in a pre-ERISA case, § 541.07(5) was applied to terminated employees' claims for unpaid vacation benefits. Kohout v. Shakopee Foundry Co., 162 N.W.2d 237 (Minn. 1968). And in Kletschka v. Abbott-Northwestern Hosp., Inc., 417 N.W.2d 752, 755 (Minn. App. 1988), the court applied § 541.07(5) to a claim for salary increases and "adjustment of all fringe benefits." The district court's decision is consistent with these cases, with the plain meaning of § 541.07(5), and with the principle of Minnesota law that the more specific of two conflicting statutes of limitations should govern. See Fagerlie v. City of Willmar, 435 N.W.2d 641, 645 (Minn. App. 1989); Minn. Stat. § 645.26.

For these reasons, we agree with the district court that § 541.07(5) is the most analogous Minnesota statute of limitations for appellants' claims under § 502(a)(1)(B).[2]

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[2] Two other judges of the District of Minnesota have also concluded that § 541.07(5) governs § 502 (a)(1)(B) claims for ERISA benefits. See Wendland v. Erickson Oil Prods., Inc., 1992 U.S. Dist. LEXIS 20569, at *16-19 (D. Minn. Oct. 2, 1992), and Arkin v. MedCenters Health Care, Inc., 1990 U.S. Dist. LEXIS 20100, at *16-17 (D. Minn. Apr. 17, 1990). See also Gray v. Greyhound Retirement & Disability Trust, 730 F. Supp. 415, 419-20 (M.D. Fla. 1990) (applying 2-year Florida statute of limitations for wage claims).

Appellants argue that Robbins v. Iowa Road Builders Co., 828 F.2d 1348 (8th Cir. 1987), cert. denied, 487 U.S. 1234 (1988), is to the contrary because we selected the general contract rather than the wage collection statute of limitations. Robbins involved an ERISA trustee's suit to collect delinquent plan contributions. A trustee's suit for unfunded contributions is not analogous to an employee's claim for benefits that are part of his or her total compensation. As we noted in Robbins, a trustee may lack relevant contribution information, but "[i]n general, a dissatisfied employee will realize when the employer has failed to afford him or her a particular employment benefit and can then promptly initiate an action against the employer." 828 F.2d at 1354.

Appellants next argue that we should reject the most analogous Minnesota statute of limitations because two years is too short a period for § 502 (a)(1)(B) claims. Appellants cite no case in which a closely analogous state statute of limitations has been rejected simply because it was too short. "In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exceptions thereto, on a closely analogous claim." Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 464 (1975). Thus, in the absence of a conflict with federal policy, "suits to recover ERISA benefits should be governed by the norm, the most analogous state statute of limitations." Johnson, 942 F.2d at 1262. Here, the Minnesota statute expressly applies to state as well as federal claims, so there is no basis to infer that it "discriminates or expresses hostility against a federal cause of action." Wyoming Laborers Health & Welfare Plan v. Morgen & Oswood Constr. Co., 850 F.2d 613, 619 (10th Cir. 1988).

Appellants also have no support for their assertion that a two-year limitations period does not afford a realistic opportunity to assert ERISA benefit claims. A far shorter limitations period governs many employee claims under the

federal labor laws. See DelCostello v. International Bhd. of Teamsters, 462 U.S. 151 (1983) (adopting six-month federal limitations period for employee suits against employers and unions for relief under collective bargaining agreements). Of course, different policy considerations underlie the limitations issue under various federal labor laws. But the Court's analysis in DelCostello -- noting the need to balance substantive federal policy interests and the policies of finality and repose underlying statutes of limitations -- persuades us that a two-year statute of limitations for § 502 (a)(1)(B) benefit claims is not fundamentally unfair or at odds with federal policy. That is the end of the inquiry -- "there is no reason to reject the characterization that state law would impose unless that characterization is unreasonable or otherwise inconsistent with national . . . policy." United Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 706 (1966).

Finally, appellants argue that their claims are timely under the two-year statute of limitations because Armco's refusal to pay benefits is a continuing breach of the plans. We disagree. These causes of action accrued when the plans were terminated and ceased paying benefits in 1986. See Mason v. Aetna Life Ins. Co., 901 F.2d 662 (8th Cir. 1990). Appellants did not file suit within two years of that time. Their § 502(a)(1)(B) claims are time-barred.

II. Breach of Fiduciary Duty Claims

Appellants allege that Armco breached its fiduciary duties under §§ 404(a) and 405 of ERISA, 29 U.S.C. §§ 1104(a), 1105, by (1) failing to pay benefits according to the terms of the plans; (2) failing to fund or cause Reserve to fund the plans; (3) failing to inform participants that the plans were unfunded; (4) implying that health insurance premiums were being paid when in fact Reserve was self-insured; and (5)

falsely implying that the plans had sufficient assets. For purposes of this appeal, Armco concedes that it is a plan fiduciary and that appellants' benefits under the plans are vested, issues it would contest if the case were remanded. Appellants seek to recover plan benefits directly from Armco as a remedy under §§ 502 (a)(2) and (a)(3) of ERISA, 29 U.S.C. §§ 1132(a)(2), (a)(3).[3] The district court dismissed these claims on the ground that appellants' claims for benefits are time-barred, and therefore they are no longer ERISA participants with standing to assert claims for breach of fiduciary duty under § 502 (a)(2) or § 502(a)(3). We agree.

Only a "participant" or a "beneficiary" may bring a civil enforcement action under §§ 502 (a)(2) and (a)(3). A participant or a beneficiary is defined in ERISA as someone "who is or may become eligible to receive a benefit of any type from an employee benefit plan." 29 U.S.C. §§ 1002(7), (8). The Supreme Court construed this statutory definition in Firestone Tire & Rubber Co. v. Bruch, 489 U.S. at 117-18:

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[3] § 502(a) provides that a civil action may be brought

"(2) by the Secretary [of Labor], or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

"(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan."

Section 502(a)(2) does not "authorize any relief except for the plan itself," Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 144 (1985), and § 502(a)(3) only authorizes traditional equitable relief, not compensatory damages, see Mertens v. Hewitt Assocs., 113 S. Ct. 2063 (1993). Armco vigorously argues that these limitations foreclose the relief appellants seek under these sections, issues that we need not address.

> In our view, the term "participant" is naturally read to mean either employees in, or reasonably expected to be in, currently covered employment, or former employees who have a reasonable expectation of returning to covered employment or who have a colorable claim to vested benefits. In order to establish that he may become eligible for benefits, a claimant must have a colorable claim that (1) he will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future.

(Emphasis added; citations and internal quotations omitted.) Appellants do not presently have a colorable claim for vested benefits because all their benefit claims are time-barred. The fact that they were plan participants in the past is irrelevant. "The statute by its terms does not permit a civil action by someone who was a participant at the time of the alleged ERISA violation. Rather, it is written in the present tense, indicating that current participant status is the relevant test." Raymond v. Mobil Oil Corp., 983 F.2d 1528, 1534-35 (10th Cir.) (emphasis in original; citations omitted), cert. denied, 114 S.Ct. 81 (1993).

Several circuits have crafted an exception to the Bruch requirement for cases in which, "but for the employer's conduct alleged to be in violation of ERISA," the employee or former employee would be a plan participant. Christopher v. Mobil Oil Corp., 950 F.2d 1209, 1221 (5th Cir. 1992); accord, Mullins v. Pfizer, Inc., 23 F.3d 663, 666-68 (2d Cir. 1994); Vartanian v. Monsanto Co., 14 F.3d 697, 700-01 (1st Cir. 1994). Other circuits have declined to adopt this exception. See Raymond, 983 F.2d at 1536. We apparently adopted it

without discussing the issue in Howe v. Varity Corp., 36 F.3d 746 (8th Cir. 1994).[4]

This exception only applies when the fiduciary's breach of duty has deprived the § 502(a)(2) or § 502(a)(3) plaintiff of participant status. It does not apply to claimants whose loss of participant status resulted from their own actions. See Shawley v. Bethlehem Steel Corp., 989 F. 2d 652, 659 (3d Cir. 1993); Sallee v. Rexnord Corp., 985 F.2d 927, 928-30 (7th Cir. 1993) (employees who voluntarily quit and sue for severance pay are not participants). This interpretation of the post-Bruch exception is consistent with the law in this circuit prior to Bruch. See Gilguist v. Becklin, 675 F. Supp. 1168 (D. Minn. 1987) (former employees who received lump-sum vested benefits are not participants), aff'd mem., 871 F. 2d 1093 (8th Cir. 1988). Here, appellants lost their participant status when they allowed their benefit claims to become time-barred. A person who gives up participant status through inaction also relinquishes standing to complain of prior plan mismanagement.

Appellants protest that this ruling improperly allows a two-year state statute of limitations for benefit claims to preempt ERISA's longer statute of limitations for breaches of fiduciary duty. See ERISA § 413, 29 U.S.C. § 1113. This contention is fundamentally flawed. The issue in this case is whether appellants have statutory standing as participants to assert breach-of-fiduciary-duty claims. We agree with the district court that they do not. If they did have standing, § 413 would provide the statute of limitations governing their breach-of-fiduciary-duty claims. That appellants lack standing

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[4] Presumably this issue was not raised in Howe, given Chief Judge Arnold's otherwise thorough opinion. It is clear that the claimants in Howe satisfied this exception -- they were granted equitable relief restoring their status and benefits in an ERISA plan from which they had been fraudulently induced to withdraw.

because they allowed other claims to become time-barred under ERISA does not "preempt" § 413.

The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 93-3860MND

Harold E. Adamson, et al.,	*	
	*	
Appellants	*	
	*	Order Denying Petition for
vs.	*	Rehearing and Suggestion
	*	for Rehearing En Banc
Armco, Inc.,	*	
	*	
Appellee.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

March 24, 1995

Order entered at the Direction of the Court:

s/s Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

HAROLD E. ADAMSON, et al., 5-92 CIV 114

Plaintiffs,

v. **ORDER**

ARMCO INC.,

Defendant.

Peterson, Engberg & Peterson, by JOHN G. ENGBERG, Esq., and MARK W. BAY, Esq., of Minneapolis, Minnesota, appeared for the plaintiffs.

Dorsey & Whitney, by JOHN D. LEVINE, Esq., PAUL R. DIESETH, Esq., and VERNLE C. DUROCHER, JR., Esq., of Minneapolis, Minnesota, appeared for the defendant.

This matter came before the Court on December 18, 1992, on the defendant's motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

I. BACKGROUND

The plaintiffs in this action were formerly employed by Reserve Mining Company ("Reserve"). In July, 1986, Reserve ceased its operations, and in August, 1986, Reserve filed for bankruptcy. At the time Reserve ceased its operations, each

of the plaintiffs was either a salaried employee or a retiree of Reserve.

The plaintiffs have sued Armco Inc. ("Armco"), seeking to recover benefits due to them under various Reserve employee benefit plans. The plaintiffs allege that Armco is liable for these benefits as Reserve's alter ego. Alternatively, the plaintiffs allege that Armco is liable as an independent fiduciary or co-fiduciary of the various plans. This lawsuit was filed in July, 1992.

In their complaint, the plaintiffs allege thirty-seven counts against Armco. Twenty-five of these counts allege that Armco violated the Employee Retirement Income Security Act ("ERISA"). The remaining twelve counts are brought under state law.[1]

Armco asks this Court to dismiss all of the plaintiffs' claims on the grounds that they are time-barred as a matter of law.

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[1] Count XIII of the plaintiffs' complaint is captioned "Causing a Breach of Fiduciary Duty." Although no statutory reference is contained in Count XIII, at oral argument, plaintiffs' counsel stated that Count XIII was brought under both ERISA and state law. Accordingly, the Court will analyze Count XIII as both a common law claim and a claim under 29 U.S.C. § 1105 ("Liability for breach by co-fiduciary"). Count XXII of the plaintiffs' complaint is captioned "Severance Pay Plan." Count XXIII of the plaintiffs' complaint is captioned "Supplemental Layoff Benefits Plan." In these two counts, the plaintiffs allege that the Severance Pay Plan and the Supplemental Layoff Benefits Plan are employee benefit plans governed by ERISA, but they do not plead ERISA causes of action. Instead, they allege that Armco "violated" these agreements. Because the plaintiffs subsequently plead ERISA causes of action with respect to these same plans, the Court presumes that Counts XXII and XXIII are intended to be state law causes of action.

II. ANALYSIS

A. Standard of Review

To state a claim sufficient to withstand a motion to dismiss, a plaintiff must state facts which, if proven, would support a claim and entitle him to relief. Haines v. Kerner, 404 U.S. 519 (1972); Tatum v. Iowa, 822 F.2d 808, 810 (8th Cir. 1987). In passing on a motion to dismiss, the court must presume that the factual allegations in plaintiff's complaint are true and accord all reasonable inferences from those facts to him or her. Malek v. Camp, 822 F.2d 812, 814 (8th Cir. 1987). Furthermore, a plaintiff's complaint should not be dismissed for failure to state a claim upon which relief can be granted unless it appears beyond doubt that the plaintiff can prove no set of facts entitling him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Malek, 822 F.2d at 814.

B. The Plaintiffs' State Law Claims (Counts I, VII, XIII, XIV, XV, XXI, XXII, XXIII, XXIX, XXX, XXXI, and XXXVII)

The plaintiffs have asserted various contract and promissory estoppel claims against Armco. Armco argues that the two-year statute of limitations for damages arising out of the employment relationship governs these claims and that they are, therefore, time-barred. See Minn. Stat. § 541.07(5). The plaintiffs have chosen not to contest this issue.

The plaintiffs have not received any benefits from the plans since Reserve filed for bankruptcy in 1986. This lawsuit was not filed until 1992. Accordingly, the plaintiffs' state law claims are time-barred. As the plaintiffs concede in their memorandum, these claims are also presumably preempted by ERISA.

C. The Plaintiffs' 29 U.S.C. § 1132(a)(1)(B) Claims (Counts II, VIII, XVI, XXIV, and XXXII)

The plaintiffs have asserted claims against Armco under 29 U.S.C. § 1132(a)(1)(B) (ERISA § 502(a)(1)(B)). This section of ERISA provides plan participants with the equivalent of a common law contract action and allows them to sue for "benefits due" to them. However, ERISA provides no statute of limitations for claims brought under this section. Johnson v. State Mut. Life Assurance Co. of Am., 942 F.2d 1260, 1261-62 (8th Cir. 1991). Instead, a court must apply the most analogous state-law statute of limitations. Wilson v. Garcia, 471 U.S. 261, 266-67 (1985); Johnson, 942 F.2d at 1262.

Armco argues that the two-year statute of limitations for damages arising out the employment relationship applies to the plaintiffs' ERISA § 502(a)(1)(B) claim as well as their state law claims. See Minn. Stat. § 541.07. The plaintiffs argue that the six-year statute of limitations for contract actions applies to these claims. See Minn. Stat. § 541.05, subd. 1(1). Therefore, this Court must first determine which statute of limitations governs the plaintiffs' ERISA § 502(a)(1)(B) claims.

To determine the most analogous state-law statute of limitations, a court must characterize a plaintiff's claim as a matter of federal law. Jenkins v. Local 705 Int'l Btd. of Teamsters Pension Plan, 713 F.2d 247, 252 (7th Cir. 1983). Policy considerations may also influence a court's choice of the appropriate statute of limitations. Id. at 251; Wyoming Laborers Health & Welfare Plan v. Morgan & Oswood, 850 F.2d 613, 619 (10th Cir. 1988).

Minn. Stat. § 541.07(5) provides, in relevant part:

> Except where the uniform commercial code or this section otherwise prescribes, the following actions shall be commenced within two years:
>
> * * *
>
> (5) For the recovery of wages or overtime or damages, fees or penalties accruing under any federal or state law respecting the payment of wages or overtime or damages . . . . (The term "wages" means all remuneration for services or employment, including commissions and bonuses and the cash value of all remuneration in any medium other than cash, where the relationship of master and servant exists . . .);

Id. Minnesota state courts have consistently held that this two-year statute of limitations governs actions arising from the employment relationship. See, e.g., Portlance v. Golden Valley State Bank, 405 N.W.2d 240, 243 (Minn. 1987) (breach of employment contract claim seeking lost income governed by Minn. Stat. § 541.07(5)); Kletschka v. Abbott-Northwestern Hospital, 417 N.W.2d 752, 755 (Minn. Ct. App. 1988) (breach of contract claim seeking back pay and adjustment of fringe benefits governed by Minn. Stat. § 541.07(5)); Stowman v. Carlson Cos., 430 N.W.2d 490, 493 (Minn. Ct. App. 1988) ("all damages arising out of the employment relationship are subject to the two-year statute of limitations set forth in Minn. Stat. § 541.07(5)").

On two previous occasions, different judges of this Court have held that the two-year statute of limitations under Minn. Stat. § 541.07(5) applies to claims brought under ERISA § 502(a)(l)(B). See Wendland v. Erickson Oil Prods., No. 3-92-0080, slip op. at 14 (D. Minn. October 2, 1992) (Magnuson, J.); Arkin v. MedCenters Health Care, No. 4-88-907, slip op. at 14 (D. Minn. April 17, 1990) (MacLaughlin, J.). The Court

finds the analysis in these opinions persuasive and concludes that the plaintiffs' ERISA § 502(a)(1)(B) claims are governed by a two-year statute of limitations.[2] The plaintiffs' ERISA § 502(a)(1)(B) claims are, therefore, time-barred.

The plaintiffs have also argued that a "continuing violation" by Armco prevents their ERISA § 502 claims from being time-barred. The practical effect of the plaintiffs' argument would be to extent [sic] the limitations period into perpetuity and render it meaningless. The Court rejects this argument and finds that the plaintiffs' ERISA § 502 claims are time-barred.

D. The Plaintiffs' 29 U.S.C. §§ 1104(a) & 1105 Claims (Counts III, IV, V, IX, X, XI, XIII, XVII, XVIII, XIX, XXV, XXVI, XXVII, XXXIII, XXXIV, and XXXV).

The plaintiffs have also brought claims under 29 U.S.C. § 1104(a) (ERISA § 404(a)) and 29 U.S.C. § 1105 (ERISA § 405), alleging that Armco breached the fiduciary duty it owed to Reserve's benefit plans. Actions brought under ERISA § 404(a) and ERISA § 405 are governed by a specific statute of limitation. These claims must be brought within six years from the date of the last action constituting a breach or three years

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[2] The Court found one published ERISA decision involving a similar choice between a statute of limitations for employment disputes and the statute of limitations for general contracts. See Vernau v. Vic's Market, Inc., 896 F.2d 43 (3d Cir. 1990). In Vernau, the Court adopted the three-year statute of limitations from Pennsylvania's Wage Payment and Collection Law, rather than the four-year statute of limitations for general contract actions. Id. at 45. In a footnote, however, the Court noted that the choice between a three-year or four-year statute did not make a difference in that case and listed three factors that it considered relevant if the question was ever reconsidered in a case where the choice made a difference. Although this Court does not find the factors persuasive, it wishes to bring this case to the parties attention.

from the date the plaintiff had actual knowledge of the breach, whichever is shorter. See 29 U.S.C. § 1113 (ERISA § 413); Dasler v. E. F. Hutton & Co., 694 F. Supp. 624, 632 (D. Minn. 1988).

Some question exists regarding the legal basis for each of the plaintiffs' breach of fiduciary duty claims. With respect to each benefit plan, the plaintiffs plead three counts alleging that Armco breached its fiduciary duty under ERISA § 404(a), the "prudent man standard of care." The plaintiffs then plead a single count alleging that Armco breached its duty as a co-fiduciary under ERISA § 405. In each of the counts alleging that Armco breached its duty as a co-fiduciary, the complaint states that "[a]s an alternative to [the previous three counts], if the Court finds that Reserve Mining Company was not the alter ego of the Defendant Armco, Defendant Armco was a co-fiduciary with Reserve Mining Company of the [plan]. See Plaintiffs' Complaint at Count VI ¶ 55, Count XII ¶ 90, Count XX ¶ 131, Count XXVIII ¶ 188, Count XXXVI ¶ 243.

Accordingly, the Court construes each count brought under ERISA § 404(a) as an assertion that Armco, as Reserve's alter ego, is liable for Reserve's breach of fiduciary duty ("the alter ego claims").[3] The Court construes each count brought under ERISA § 405 as an assertion that Armco

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[3] The Court notes that ERISA § 404(a) does not provide a cause of action. Instead, it merely establishes a 'prudent man' standard of care that governs a fiduciary's conduct. A fiduciary is liable to a plan for any losses resulting from his or her breach under ERISA § 409. See 29 U.S.C. § 1109. Under ERISA § 405, a co-fiduciary is also liable to a plan for another fiduciary's breach if he or she participated in or concealed the breach, enabled the breach by failing to maintain the "prudent man" standard of care, or knew of the breach and failed to make reasonable efforts to remedy the breach. ERISA § 502(a)(2) authorizes a civil action by a plan participant, beneficiary, or fiduciary for relief on behalf of the plan under ERISA 409 (and implicitly under ERISA § 405). See 29 U.S.C. § 1132(a)(2).

was a separate, independent fiduciary of the plans, and that it is liable as a co-fiduciary for concealing, enabling, or failing to remedy Reserve's breach ("the independent fiduciary claims").[4]

As explained below, the Court finds that the plaintiffs' alter ego claims are time-barred. These claims will be dismissed with prejudice. The plaintiffs independent fiduciary claims will be dismissed without prejudice. The Court will grant plaintiffs' counsel leave to file an Amended Complaint that repleads each independent fiduciary claim.

Armco argues that the plaintiffs had actual knowledge of any alleged breach of fiduciary duty in July, 1986, when their benefits were discontinued. The plaintiffs did not file this lawsuit until July, 1992, and, therefore, Armco argues, under the three-year statute of limitations, their breach of fiduciary duty claims are time-barred. The plaintiffs argue that knowledge of Reserve's failure to provide benefits under the plans can not be equated with actual knowledge of Armco's status as Reserve's alter ego or as an unnamed fiduciary or co-fiduciary. Therefore, the plaintiffs argue, the limitations period on their alter ego claims did not begin to run until they were aware of sufficient facts to infer the alter ego relationship. They likewise argue that the limitations period on their independent fiduciary claims did not begin to run until they were aware of sufficient facts to infer Armco's status as an unnamed fiduciary or co-fiduciary of the benefit plans.

Armco's motion to dismiss both the alter ego and the independent fiduciary claims must be denied unless the Court concludes that the plaintiffs' knowledge of their benefits being discontinued constitutes "actual knowledge of the [alleged]

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[4] As previously stated in note 1, supra, the Court construes Count XIII as both a common law claim and a claim under ERISA § 405. To the extent that Count XIII alleges a claim under ERISA § 405, it is included in the independent fiduciary claims.

breach or violation" under ERISA § 413.[5] Constructive knowledge is not sufficient to trigger the statute of limitations. The Seventh Circuit recently commented on the sometimes difficult distinction between actual and constructive knowledge.

> It is difficult to say in the abstract precisely what constitutes "actual knowledge" of a "breach or violation." As [the plaintiff] correctly insists, actual knowledge must be distinguished from constructive knowledge. To charge [the plaintiff] with actual knowledge of an ERISA violation, it is not enough that he had notice that something was awry; he must have had specific knowledge of the actual breach of duty upon which he sues. At the same time, the relevant knowledge for triggering the statute of limitations is knowledge of the facts or transaction that constituted the alleged violation. Consequently, it is not necessary for a potential plaintiff to have knowledge of every last detail of a transaction, or knowledge of its illegality. The line between actual and constructive knowledge of a violation is thus not as bright as the [plaintiff] suggests, and in cases near the border the distinction may well be merely semantic. Suffice it to say that to have actual knowledge of a violation to trigger ERISA's three-year statute of limitations, a plaintiff must know of the essential facts of the transaction or conduct constituting the violation.

Martin v. Consultants & Admins., 966 F.2d 1078, 1086 (7th Cir. 1992) (citations omitted); see also, Gluck v. Unisys Corp.,

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[5] Although the same general standard applies to both the alter ego claims and the independent fiduciary claims, as the Court explains below, the conceptual difference between these claims requires that they be analyzed separately.

960 F.2d 1168, 1177 (3d Cir. 1992) ("'actual knowledge of a breach or violation' requires that a plaintiff have actual knowledge of all material facts necessary to understand that some claim exists, which facts could include . . . actual harm").

Normally, a plaintiff's knowledge that his or her benefits have been denied or will not be received constitutes sufficient actual knowledge to trigger the three-year statute of limitations for the type of breach of fiduciary duty claim here alleged. See Wise v. Dallas & Mavis Forwarding Co., 753 F. Supp. 601, 606-07 (W.D.N.C. 1991); Meade v. Pension Appeals and Review Committee, 760 F. Supp. 671, 674-75 (S.D. Ohio 1991), rev'd on other grounds, 966 F.2d 190 (6th Cir. 1992).[6] However, federal courts have held that the three-year limitations period in ERISA § 413 does not begin to run until a plaintiff has actual knowledge of the defendant's involvement in the transaction or until a plaintiff learns that a defendant is a plan fiduciary. See, e.g., Brock v. Nellis, 809 F.2d 753, 754 (11th Cir.), cert. dismissed, 483 U.S. 1057 (1987); Fechter v. Connecticut Gen. Life Ins. Co., 800 F. Supp. 178, 181 (E.D. Pa. 1991); Useden v. Acker, 734 F. Supp. 978, 979-80 (S.D. Fla. 1989), aff'd, 947 F.2d 1563 (11th Cir. 1991), and petition for cert. filed, 60 U.S.L.W. 3843 (U.S. June 1, 1992) (No. 91-1944) In none of these cases, though, were the plaintiffs attempting to reach an unnamed fiduciary by alleging that it was the alter ego of a separate, primarily-liable company. Accordingly, in this case, the plaintiffs' alter ego claims must be analyzed separately from their independent fiduciary claims.

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[6] The district court, in Meade, was applying ERISA § 413 as it existed prior to its amendment in 1987. At that time, the three-year limitations period began to run on either actual or constructive knowledge of a breach of fiduciary duty. In Meade, however, the district court expressly found that the plaintiff had "actual knowledge" of the alleged breach of fiduciary duty when his claim for benefits was first denied. 760 F. Supp. at 675.

When a plaintiff alleges that one company is the alter ego of another, that plaintiff is essentially arguing that the two companies are the same legal entity. The liability of an alter ego company stems from this fact. The alter ego company has not committed a separate actionable wrong, so there is no separate conduct or injury to discover before that plaintiff's cause of action accrues and the limitations period begins to run. Therefore, companies in an alter ego relationship are treated as the same legal entity for statute of limitations purposes. See, e.g., National Labor Relations Board v. O'Neill, 965 F.2d 1522, 1529 (9th Cir. 1992) (where two parties are alter egos, timely service against one is sufficient to initiate proceedings against both); Lumpkin v. Envirodyne Indust., 933 F.2d 449, 465-66 (7th Cir. 1991) (same limitations period applies to ERISA § 502 claims against successor employer and its alter ego), cert. denied, 112 S.Ct. 373 (1991); Wm. Passalacqua Builders v. Resnick Developers South, 933 F.2d 131, 143 (2d Cir. 1991) (action to enforce judgment from a prior action against alter ego companies is not time-barred because alter egos are treated as one entity).

In this case, the three-year limitations period began to run on the plaintiffs' alter ego claims when they knew "the essential facts of the . . . conduct constituting the violation." Martin, 966 F.2d at 1086. The alter ego claims allege no actionable conduct on the part of Armco other than that of Reserve. Therefore, the limitations period for the plaintiffs' claims against both Reserve and Armco, as Reserve's alter ego, began to run when benefits were discontinued in July, 1986.[7]

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[7] No cases dealing with this issue in the context of the three-year statute of limitations on ERISA breach of fiduciary duty claims were found by the Court or provided to the Court by counsel. However, the Court found one unreported case dealing with an analogous situation. In Solomon v. Mutual Indust., No. 90-4772, 1991 WL 42459 (E.D. Pa. March 26, 1991), the plaintiffs, as trustees of employee benefit plans,

The plaintiffs argue that their alter ego claims against Armco did not accrue until they were aware of sufficient facts to infer the alter ego relationship. The Court does not accept this argument. The practical effect of the plaintiffs' argument would be that plaintiffs, with full knowledge of a fiduciary's breach of duty and its harmful effects, could wait to file a lawsuit until such time as they happened to stumble upon facts suggesting an alter ego relationship between the fiduciary and another company.

The plaintiffs also argue that a "continuing violation" by Armco prevents their breach of fiduciary duty claims from being time-barred. The practical effect of the plaintiffs' argument would be to extend the limitations period into perpetuity and render it meaningless. Cf., Meade, 760 F. Supp. at 675 (rejecting argument that "would in effect swallow the statute of limitations"). The Court rejects this argument and concludes that the three-year limitations period on the plaintiffs' alter ego claims began to run when plan

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brought an ERISA action against Mutual Industries ("Mutual") to collect benefit plan contributions owed to the plans under the terms of collective bargaining agreements. The company primarily liable under the collective bargaining agreements, Nachman Industries ("Nachman") had filed a Chapter 11 bankruptcy proceeding, so the plaintiffs brought their action against Mutual by alleging that it was the alter ego of the Nachman. The district court, applying a three-year statute of limitations, held that the plaintiffs' cause of action accrued on "the date Nachman permanently ceased all covered operations. It was at this point that the existence and source of the plaintiffs' injury was established, irrespective of whether plaintiffs knew they had a cause of action against Nachman or Mutual." Id. at *4. The Court then went on to find that summary judgment was inappropriate because the plaintiffs alleged that Mutual "engaged in an elaborate scheme" to hide its relationship with Nachman and a factual dispute existed regarding the plaintiffs' diligence in discovering the relationship. Id. In this case, the plaintiffs have not alleged that Armco engaged in any affirmative acts of concealment.

benefits were discontinued in 1986. Therefore, the alter ego claims are time-barred.

In contrast to the alter ego claims, the plaintiffs' independent fiduciary claims allege that Armco was a separate, independent fiduciary or co-fiduciary of the plans and that Armco violated ERISA § 405 through its own conduct, independent of its alleged status as Reserve's alter ego. The independent fiduciary claims, therefore, fall under the general rule, previously discussed, which states that the three-year limitations period does not begin to run until the plaintiffs had actual knowledge of Armco's involvement with the benefit plans or until they learned that Armco was a fiduciary of the plans. See Brock, 809 F.2d at 754; Fechter, 800 F. Supp. at 181; Useden, 734 F. Supp. at 979-80. A determination of whether the plaintiffs had such knowledge more than three years prior to the initiation of this lawsuit can not be made on a Rule 12(b)(6) motion to dismiss.

E. Repleading the "Independent Fiduciary" Claims.

In the interest of properly framing the remaining issues, the Court will grant plaintiffs' counsel leave to file an Amended Complaint asserting the remaining claims and omitting those that are herein dismissed. The Court, however, has several concerns in conjunction with affording plaintiffs that opportunity. Counsel for plaintiffs must assess the nature of any relief available under an ERISA § 409 or ERISA § 405 claim.

First, will breach of fiduciary duty claims, even if successful, provide the plaintiffs with any relief? When a participant sues a fiduciary or co-fiduciary for a breach of fiduciary duty under ERISA § 409 or ERISA § 405, the participant is, in effect, suing on behalf of the plan. See Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 140-42 (1985). The participant does not receive the proceeds

from a successful claim because the fiduciary is held liable "to [the] plan [for] any losses to plan resulting from [the] breach." ERISA § 409(a). The proceeds from a successful claim inure to the plan, not the suing participant. For this reason, a breach of fiduciary duty claim is most frequently brought in conjunction with a claim for "benefits due" under ERISA 502(a)(1)(B). These two claims interrelate: the breach of fiduciary duty claim provides funds for the plan, and the claim for benefits allows the participant to recover what is due to him or her under the terms of the plan from those funds. In this instance, however, the Court has concluded that the plaintiffs' benefits claims against the plans under ERISA § 502(a)(1)(B) are time-barred. Prior to filing their Amended Complaint, the plaintiffs should determine if a legal basis exists to ensure that any proceeds from this litigation would eventually be disbursed to them.

Second, the Court calls to the attention of counsel two recent decisions of this Court. In Walker v. BML Transport, Inc., No. 3-91-270, slip op. at 15-17 (D. Minn. Jan. 14, 1993) (Alsop, J.) and in Baron v. Honeywell, Inc., No. 3-92-446, slip op. at 5-9 (D. Minn. Sept. 11, 1992) (Kyle, J.), this Court held that, because of the derivative nature of an ERISA breach of fiduciary duty action, the requirements of Rule 23.1 and the notice provision of Rule 23(c)(2) of the Federal Rules of Civil Procedure should be followed.

Finally, because the Court anticipates additional dispositive motions in this case, counsel must strictly adhere to the ERISA statutory framework in the Amended Complaint. Furthermore, each separate alleged breach should be set forth in a separate count, and each count should specifically state the legal and statutory basis for the claim. As a result of this order, the alter ego theory is no longer available to the plaintiffs as a means of reaching Armco, and, therefore, it shall not be included in the Amended Complaint. Therefore, the plaintiffs' allegations against Armco must assert that Armco is

an independent fiduciary of the various plans and that its conduct in some way violated ERISA § 409 or ERISA § 405.[8]

Accordingly, based upon a review of all the files, records, and proceedings herein,

IT IS HEREBY ORDERED That

1. Defendant Armco Inc.'s Motion to Dismiss pursuant to Rule 12 of the Federal Rules of Civil Procedure is GRANTED with respect to Counts I, II, III, IV, V, VII, VIII, IX, X, XI, XIV, XV, XVI, XVII, XVIII, XIX, XXI, XXII, XXIII, XXIV, XXV, XXVI, XXVII, XXIX, XXX, XXXI, XXXII, XXXIII, XXXIV, XXXV, and XXXVII, and these claims are dismissed with prejudice.
2. Defendant Armco Inc.'s Motion to Dismiss pursuant to Rule 12 of the Federal Rules of Civil Procedure is GRANTED with respect to Count XIII. To the extent that Count XIII alleges a cause of action under Minnesota common law, the claim is dismissed with prejudice. To the extent that Count XIII alleges a cause of action under 29 U.S.C. § 1105, the claim is dismissed without prejudice and leave is granted to the plaintiffs to replead in accordance with this Order.
3. Defendant Armco Inc.'s Motion to Dismiss pursuant to Rule 12 of the Federal Rules of Civil Procedure is GRANTED with respect to Counts VI, XII, XIII, XX, XXVIII, and XXXVI. These claims are, however,

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[8] The Court has concluded that the plaintiffs' independent fiduciary claims are pleaded exclusively under ERISA § 405. However, because some confusion exists with regard to the statutory basis for the various breach of fiduciary duty claims, the Court will allow the plaintiffs to replead independent fiduciary claims alleging a cause of action under ERISA § 405, ERISA § 409, or both.

dismissed without prejudice and leave is granted to the plaintiffs to replead in accordance with this Order.

4. The plaintiffs may file and serve on Armco's attorneys an Amended Complaint by March 15, 1993. If this Amended Complaint includes claims based upon 29 U.S.C. § 1105 or 29 U.S.C. § 1109, they shall be pleaded in the following manner:

   a. Each claim alleging a breach of fiduciary duty under ERISA shall be set forth in a separate count.
   b. Each count alleging a breach of fiduciary duty under ERISA shall set forth the specific statutory basis for the claim and a concise factual statement of the alleged breach.
   c. Any count alleging a breach of fiduciary duty may pertain to more than one employee benefit plan, provided that the breach is common to each of the employee benefit plans.

DATED: February 16, 1993.

s/s
DONALD D. ALSOP, Senior Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

HAROLD E. ADAMSON, et al., 5-92 CIV 114

Plaintiffs,

v. **ORDER**

ARMCO INC.,

Defendant.

Peterson, Engberg & Peterson, by JOHN G. ENGBERG, Esq., and MARK W. BAY, Esq., Minneapolis, Minnesota, appeared for the plaintiffs.

Dorsey & Whitney, by JOHN D. LEVINE, Esq., and PAUL R. DIESETH, Esq., Minneapolis, Minnesota, appeared for the defendant.

This matter came before the Court on October 8, 1993, on the defendant's motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

I. BACKGROUND

The plaintiffs in this action were formerly employed by Reserve Mining Company ("Reserve). In July, 1986, Reserve ceased its operations and in August, 1986, Reserve filed for bankruptcy. At the time Reserve ceased its operations, each

of the plaintiffs was either a salaried employee or a retiree of Reserve.

The plaintiffs have sued Armco Inc. ("Armco"), seeking to recover benefits due to them under various Reserve employee benefit plans. In a previous motion, Armco sought to dismiss this action based upon the various statutes of limitations applicable to the plaintiffs' claims. By order dated February 16, 1993, the Court ruled that the two-year statute of limitations in Minn. Stat. § 541.07 applied to the plaintiffs' 29 U.S.C. § 1132(a)(1)(B) (ERISA § 502(a)(1)(B)) claims for "benefits due" and that they were time-barred. The Court also ruled that the plaintiffs' 29 U.S.C. § 1132(a)(2) (ERISA § 502(a)(2)) claims for breach of fiduciary duty were time-barred under the three-year statute of limitations contained in 29 U.S.C. § 1113 (ERISA § 413), insofar as they alleged that Armco, as Reserve's alter ego, was liable for Reserve's breach of fiduciary duty ("the alter ego claims"). These claims were dismissed with prejudice. The Court construed the remainder of the plaintiffs' breach of fiduciary duty claims as alleging that Armco was a separate, independent fiduciary of the plans and that Armco was liable for its own breaches of fiduciary duty (ERISA § 409) or for enabling a co-fiduciary breach (ERISA § 405) ("the independent fiduciary claims"). These claims were dismissed without prejudice, and the plaintiffs were offered the opportunity to replead them.

The plaintiffs have repleaded their breach of fiduciary claims in their First Amended Complaint. Counts I, III, and V of the First Amended Complaint allege breaches of fiduciary duty under ERISA § 409. Counts II, IV, and VI allege breaches of co-fiduciary duty under ERISA § 405. These claims are the subject of Armco's current motion to dismiss. Armco argues that the plaintiffs' breach of fiduciary duty claims should be dismissed because (1) the plaintiffs lack standing to bring an ERISA breach of fiduciary claim, (2) the plaintiffs failed to bring their claims in a derivative capacity,

and (3) the plaintiffs' allegations fail to state claims actionable as ERISA breaches of fiduciary duty.

With the Court's permission, the plaintiffs have also brought a claim for injunctive or other equitable relief under 29 U.S.C. § 1132(a)(3) (ERISA § 502(a)(3)) in Count VII. In Warner v. Armco Inc., No. 5-92-120, slip op. at 9-10 (D. Minn. February 16, 1992), a related case, the Court held that section 502(a)(3) claims are also governed by the two-year statute of limitations in Minn. Stat. § 541.07. Therefore, the plaintiffs' section 502(a)(3) claim is time-barred and Count VII will be dismissed. The Court granted the plaintiffs permission to plead this claim to preserve the issue for appeal.

II. ANALYSIS

A. Standard of Review

To state a claim sufficient to withstand a motion to dismiss, a plaintiff must state facts which, if proven, would support a claim and entitle him to relief. Haines v. Kerner, 404 U.S. 519 (1972); Tatum v. Iowa, 822 F.2d 808, 810 (8th Cir. 1987). In passing on a motion to dismiss, the court must presume that the factual allegations in the plaintiff's complaint are true and accord all reasonable inferences from those facts to him or her. Malek v. Camp, 822 F.2d 812, 814 (8th Cir. 1987). Furthermore, a plaintiff's complaint should not be dismissed for failure to state a claim upon which relief can be granted unless it appears beyond doubt that the plaintiff can prove no set of facts entitling him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Malek, 82 F.2d at 814.

In support of and in response to Armco's motion to dismiss, counsel have set forth certain facts and submitted various plan documents through affidavits. To the extent that the Court looks to any of these materials in resolving this motion, Armco's motion to dismiss is more properly

considered a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 12(b).

C. Standing To Bring a Claim Under 29 U.S.C § 1132(a)(2)

ERISA breach of fiduciary duty claims may be brought by "a participant, beneficiary or fiduciary." 29 U.S.C. § 1132(a)(2). The plaintiffs do not claim to be fiduciaries. Therefore, unless they are plan participants or beneficiaries, the plaintiffs do not have standing to bring these claims.

The standard for determining whether a plaintiff has standing as an ERISA "participant" was recently summarized by the Tenth Circuit in the following manner:

> Under ERISA § 502, 29 U.S.C. § 1132, "participants" have standing to bring civil actions to enforce their rights under the terms of an ERISA-covered benefit plan or to enforce ERISA's provisions. The term "participant" is statutorily defined as "any employee or former employee of an employer, . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan . . . ." ERISA § (3)7, 29 U.S.C. § 1002(7). In Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 117, 109 S.Ct. 948, 958, 103 L.Ed.2d 80 (1989) the Supreme Court further defined the term "participant," holding that it "is naturally read to mean either 'employees in, or reasonably expected to be in, currently covered employment' or former employees who 'have . . . a reasonable expectation of returning to covered employment' or who have 'a colorable claim' to vested benefits." (quoting Saladino v. I.L.G.W.U. Nat'l Retirement Fund, 754 F.2d 473, 476 (2d Cir. 1985), and Kuntz v. Reese, 785 F.2d 1410, 1411 (9th Cir.) (per

curiam), cert. denied, 479 U.S. 916, 107 S.Ct. 318, 93 L.Ed.2d 291 (1986)). The Court has defined the statutory term "may become eligible" as requiring proof that the claimant has "a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." Firestone, 489 U.S. at 117-18, 109 S.Ct. at 958; see also Uselton v. Commercial Lovelace Motor Freight, Inc., 940 F.2d 564, 581 n.16 (10th Cir.), cert. denied, --- U.S. ----, 112 S.Ct. 589, 116 L.Ed.2d 614 (1991). Thus, to have standing to bring an ERISA action, plaintiffs must either be employees in or reasonably expected to be in currently covered employment, or former employees with a reasonable expectation of returning to covered employment or a colorable claim to vested benefits. Employees or former employees seeking to show they "may become eligible" for a benefit must prove that they have a colorable claim that they will prevail in a suit for benefits, or that eligibility requirements will be fulfilled in the future.

Raymond v. Mobil Oil Corp., 983 F.2d 1528, 1532-33, 1535 (10th Cir. 1993) (footnote omitted), cert. denied, 62 U.S.L.W. 3234 (U.S. Oct. 4, 1993). These requirements apply to purported beneficiaries as well as participants. Zinn v. Donaldson Co., Inc., 799 F. Supp. 69, 74 (D. Minn. 1992) (Doty, J.).

Armco argues that the plaintiffs do not have standing as participants or beneficiaries because their claims for "benefits due" under section 1132(a)(1)(B) (ERISA § 502(a)(1)(B)) are time-barred and therefore they do not have "a colorable claim to vested benefits." Firestone, 489 U.S. at 117. In response, the plaintiffs argue that (1) the two-year Minnesota statute of limitations should not be allowed to, in effect, preempt the three or six-year statute of limitations for breach of fiduciary

duty claims (2) the relevant time for determining whether a plaintiff has standing is at the time of the alleged breach of fiduciary duty, and (3) in the absence of a functioning plan, the plaintiffs have standing to represent the interests of the plans.

The plaintiffs' first argument--that denying them standing would cause the state-law two-year statute of limitations applicable to ERISA benefits claims to "preempt" the three or six-year statute of limitations applicable to ERISA breach of fiduciary duty claims--is a protest rather than a legal argument. In support of their second argument--that standing is determined at the time of the alleged fiduciary duty--the plaintiffs cite Bigger v. American Comm. Airlines, Inc., 652 F. Supp. 123 (W.D. Mo. 1986). Bigger does not support the plaintiffs' argument. Moreover, this argument has been explicitly rejected. See Raymond, 983 F.2d at 1534-35.

The plaintiffs cite two cases, Gruber v. Hubbard Bert Karle Weber, Inc., 675 F. Supp. 281 (W.D. Pa. 1987) and Bigger v. American Comm. Airlines, Inc., 652 F. Supp. 123 (W.D. Mo. 1986), in support of their third argument--that, in the absence of a functioning plan, the plaintiffs have standing to represent the interests of the plans. In Gruber, the court allowed a plaintiff class to bring an action for breach of fiduciary duty against the manager of a bankrupt plan. The court found that "[t]o deny plaintiffs relief on this basis [the plan's nonexistence] would reward defendants for the thoroughness of their alleged mismanagement." 675 F. Supp. at 284. In Bigger, the court held that participants in a plan that had been "spun off" from a parent plan had standing to sue fiduciaries of the parent plan. 652 F. Supp. at 125-26. Neither of these cases, both of which pre-date the Supreme Court's Firestone decision, help the plaintiffs demonstrate that they have a "colorable claim to vested benefits." Because the plaintiffs' claims for "benefits due," are time-barred, the Court concludes that they do not "have a colorable claim to vested

benefits." Therefore, the plaintiffs lack standing to bring this action, and it must be dismissed.

D. Derivative Claims Brought Under 29 U.S.C. §§ 1109 & 1105

Alternatively, Armco argues that the plaintiffs' claims should be dismissed because they are not brought in a derivative capacity on behalf of the various plans. Each of the plaintiffs' breach of fiduciary claims is brought through ERISA § 502(a)(2). This section of ERISA authorizes a participant or beneficiary to sue a "fiduciary with respect to a plan" for a breach of fiduciary duty under ERISA § 409 or, implicitly, a breach of co-fiduciary duty under ERISA § 405.

Under section 409, a fiduciary who breaches his or her duty to a plan "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach . . . ." In Massachusetts Mut. Life Ins. Co. v. Russell, the Supreme Court examined this statutory text and concluded that any "recovery for a violation of § 409 inures to the benefit of the plan as a whole," rather than individual participants. 473 US. 134, 140 (1985). The Court found that a "fair contextual reading of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than the rights of an individual beneficiary." Id. at 142. Therefore, when a participant sues a fiduciary or co-fiduciary for a breach of fiduciary duty, the participant is suing on behalf of the plan rather than himself or herself. See id. at 142 n.9 (noting "Congress' intent that actions for breach of fiduciary duty be brought in a representative capacity on behalf of the plan as a whole."); Walker v. BML Transport, Inc., No. 3-91-270, slip op. at 15-17 (D. Minn. Jan. 14, 1993) (Alsop, J.); Baron v. Honeywell,

Inc., No. 3-92-446, slip op. at 5-9 (D. Minn. Sept. 11, 1992) (Kyle, J.).

The plaintiffs in this case are not suing on behalf of the various plans; they are suing for the benefits due to them under the terms of the plan. Therefore, the plaintiffs' breach of fiduciary duty claims must be dismissed. See Lee v. Burkhart, 991 F.2d 1004, 1009 (2d Cir. 1993); Horan v. Kaiser Steel Retirement Plan, 947 F.2d 1412, 1417-18 (9th Cir. 1991); Bryant v. International Fruit Co., Inc., 886 F.2d 132, 135 (6th Cir. 1989); Baron v. Honeywell, Inc., No. 3-92-446, slip op. at 6 (D. Minn. Sept. 11, 1992); cf. Physicians HealthChoice, Inc. v. The Trustees of the Automotive Employee Benefit Trust, 988 F.2d 53, 55-56 (8th Cir. 1993) (breach of fiduciary duty claim by creditors of defunct plan dismissed because it was not brought on behalf of the plan). In Lee, as in this case, plan participants brought an action to recover benefits after the plan's self-insured sponsor filed for bankruptcy protection. The Court of Appeals, citing the Supreme Court's decision in Russell, dismissed the participants' breach of fiduciary duty claim because the plaintiffs were "seeking damages on their own behalf, not on behalf of the Plan." 991 F.2d at 1009.[1]

Accordingly, based upon a review of all the files, records, and proceedings herein,

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[1] Because the Court concludes that the plaintiffs do not have standing and that these claims have not been brought on behalf of the plans, it is not necessary to reach Armco's third argument--that the plaintiffs' allegations fail to state claims actionable as ERISA breaches of fiduciary duty.

IT IS HEREBY ORDERED That Armco, Inc.'s motion to dismiss is GRANTED, and the plaintiffs' First Amended Complaint is DISMISSED with prejudice.

DATED: October 22, 1993

s/s
DONALD D. ALSOP, Senior Judge
United States District Court

Supreme Court, U.S.
FILED
JUL 24 1995
CLERK

(2)

No. 94-2105

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

HAROLD E. ADAMSON, et. al.,

Petitioners,

vs.

ARMCO INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Eighth Circuit correctly affirmed the District Court's dismissal of petitioners' claims for benefits under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) on the ground that those claims are barred by a two year statute of limitations borrowed from Minnesota's wage claim statute.

2. Whether the Court of Appeals for the Eighth Circuit correctly affirmed the District Court's dismissal of petitioners' claims for breach of fiduciary duty under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) on the ground that petitioners lacked standing to sue as "participants" or "beneficiaries" because their benefit claims were time-barred.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

No. 94-2105

HAROLD E. ADAMSON, et. al.,

Petitioners,

vs.

ARMCO INC.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

Respondent Armco Inc. ("Armco") respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Eighth Circuit's decision in *Adamson, et al. v. Armco Inc.*, 44 F.3d 650 (8th Cir. 1995).1/ Petitioners did not raise below the two questions that they present for review regarding the appropriate statute of limitations for benefit claims under the Employee Retirement Income Security Act ("ERISA"). These questions are thus not properly before this Court. Moreover,

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1/ Pursuant to Supreme Court Rule 29.1, respondent states that it has no parent companies or subsidiaries that are not wholly owned.

the courts of appeals that have considered these issues have uniformly rejected petitioners' suggested approach, a result wholly consistent with the decisions of this Court. The third question, concerning petitioners' standing to assert ERISA breach of fiduciary duty claims, is a narrow question that is neither recurring nor important. Because there is a dearth of circuit court precedent on point, and because there is no reason to believe that other courts of appeals will disagree with the Eighth Circuit, this issue is not appropriate for review on a writ of certiorari.

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 15.1, Armco draws the Court's attention to certain relevant factual errors and omissions in the petition.

I.

FACTUAL BACKGROUND

Reserve Mining Company ("Reserve") owned and operated iron ore mining facilities in northern Minnesota from 1939 until it filed for bankruptcy in August 1986. At that time, Reserve suspended its operations and stopped providing employee benefits due under Reserve's benefit plans.

Respondents were salaried employees and retired employees of Reserve at the time it ceased operations in 1986. Respondents seek benefits allegedly due under

Reserve's benefit plans.[2/] They assert corporate veil piercing theories in an effort to hold Armco liable for the payment of those benefits.[3/]

Although petitioners knew in August 1986 that their welfare benefits had ceased, they did not file their lawsuit against Armco until July 1992, almost six years later. Petitioners try to excuse this lengthy delay by implying that it was difficult to discover the facts underlying their claims. Pet. 6-8. No such difficulty, however, prevented the United Steelworkers of America from filing a lawsuit against Armco in 1988, alleging that Armco was liable to the union and its members for Reserve's obligations under the hourly pension plan. Significantly, the attorney that represented the United Steelworkers of America in that lawsuit is the same attorney that represents petitioners. Petitioners' argument that they did not know of Armco's involvement in Reserve also belies common sense. Armco had a widely known ownership interest in Reserve since Reserve was formed in the 1950's. Some of the petitioners were Reserve officers and members of the committees that controlled Reserve's ERISA plans,

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2/ Petitioners erroneously allege that for "purposes of this petition" Armco "has conceded" that the petitioners' benefits are "vested." Pet. 5, 21. Armco has not made such a concession.

3/ Before 1983, Reserve was organized as a corporation. Armco and Republic Steel Corporation ("Republic") each owned fifty percent of its stock. On December 31, 1982, Reserve's assets were transferred to a partnership called Reserve Mining Company. This partnership had two equal partners -- First Taconite Company (a wholly-owned corporate subsidiary of Armco) and Republic-Reserve, Inc. (a wholly-owned corporate subsidiary of Republic). LTV Corporation later acquired Republic.

and therefore must have known of Armco. In any event, this disputed factual issue is not called into question by the petition for a writ of certiorari.[4/]

II.

PROCEDURAL HISTORY

Petitioners' original Complaint alleged benefit claims under ERISA § 502(a)(1)(B) and (a)(3), 29 U.S.C. § 1132(a)(1)(B), (a)(3), claims for breaches of fiduciary duty under ERISA § 404, 29 U.S.C. § 1104, and claims for breaches of co-fiduciary duty under ERISA § 405, 29 U.S.C. § 1105.[5/]

In response to Armco's motion, the District Court dismissed petitioners' benefit claims with prejudice on the ground that they were time-barred. Recognizing that

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4/ The District Court concluded that even if petitioners did not know of Armco, they knew that their benefits had stopped, triggering a potential claim against the fiduciary, Reserve. Pet. App. A-22 - A-23. After learning thereof, they had an obligation to investigate their options and consider whether they had viable claims against anyone else, including alleged alter egos. As the District Court stated, petitioners cannot be permitted to "wait to file a lawsuit until such time as they happened to stumble upon facts suggesting an alter ego relationship between the fiduciary and another company." *Id.* A-23.

5/ Petitioners erroneously claim that Armco dominated and controlled Reserve and that Armco is thus liable for their benefits under an alter ego theory. Pet. 6-7. Armco strongly disagrees with this contention, and specifically contests petitioners' claim that *Minnesota Power v. Armco Inc.*, 937 F.2d 1363 (8th Cir. 1991) put this issue to rest. *Minnesota Power* turned upon a unique set of facts that are not present in this case. Neither the District Court nor the Eighth Circuit reached petitioners' alter ego claims due to their dismissal of the lawsuit on other grounds.

ERISA provided no statute of limitations for ERISA benefit claims, the District Court concluded that it should adopt the most analogous state statute of limitations. Pet. App. A-15. It ultimately held that the Minnesota law most analogous to those claims was the two-year wage claim statute of limitations found in Minn. Stat. § 541.07(5), a conclusion previously reached by two other Minnesota federal district courts. *Id.* A-16 - A–17. Petitioners' ERISA benefit claims were therefore time-barred. The District Court also dismissed all breach of fiduciary duty claims premised upon Armco's alleged liability as Reserve's alter ego,[6/] but permitted petitioners to replead breach of fiduciary duty claims premised upon Armco's alleged independent fiduciary status. *Id.* A-17 - A-24.[7/]

Petitioners' First Amended Complaint alleged causes of action for breach of fiduciary duty, breach of co-fiduciary duty, and for equitable relief under ERISA § 502(a)(2) and (a)(3), 29 U.S.C. § 1132(a)(2), (a)(3). In

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6/ The District Court applied 29 U.S.C. § 1113, which requires breach of fiduciary duty claims to be brought within six years of the breach or three years from the date plaintiff had actual knowledge of the breach, whichever is shorter. 29 U.S.C. § 1113. Because respondents' claims were based upon the assertion that Armco, as Reserve's alleged alter ego, was liable for Reserve's breach of fiduciary duty, the District Court found that respondents had actual knowledge of the alleged breach in 1986, and that these claims were therefore time-barred. *Id.* A-17 - A-23.

7/ Petitioners wrongly imply that the District Court concluded that these independent fiduciary claims would not be barred by ERISA's breach of fiduciary duty statute of limitations. Pet. 9. More precisely, the District Court concluded that petitioners had to have actual knowledge of Armco's alleged fiduciary status for their independent fiduciary claims to accrue. The District Court concluded that a determination of that issue could not be made on a Rule 12(b)(6) motion to dismiss. *Id.* A-24.

response to Armco's renewed motion to dismiss, the District Court dismissed these claims with prejudice and entered judgment for Armco. The Court concluded that petitioners did not have standing because they did not have a "colorable claim to vested benefits." Pet. App. A-31 - A-34. They did not have a "colorable claim to vested benefits," according to the District Court, because their ERISA benefit claims were time-barred. *Id.*

The Court of Appeals for the Eighth Circuit affirmed the District Court's orders in their entirety, agreeing with the lower court's reasoning in every respect. Since ERISA did not provide a statute of limitations for benefit claims, the Court of Appeals concluded that it must select the most analogous state statute of limitations. *Id.* A-3. It noted that in the Eighth Circuit, ERISA benefit claims are characterized as contract actions. *Id.* This was not, however, the end of the inquiry, since the Court was presented with more than one contract statute of limitations -- a general contract statute and a statute governing claims for wages and benefits. *Id.* The Court therefore had to decide which statute governed claims most analogous to ERISA benefit claims. *Id.* The Eighth Circuit selected the Minnesota wage claim statute, concluding it was more analogous than the general contract statute. *Id.* at A–4 - A–6.[2/]

[2/] The Eighth Circuit carefully analyzed Minnesota case law and found that Minnesota courts would apply the wage claim statute of limitations to claims for employee benefits. *Id.* at A-4. The Court of Appeals found further support for the application of the wage claim statute in the "plain meaning" of that statute, and the principle that the more specific of two statutes of limitations should govern. *Id.*

The Eighth Circuit also confirmed that petitioners did not have standing to assert breach of fiduciary duty claims. The Circuit Court pointed out that only "participants" or "beneficiaries" may bring such actions under ERISA. In determining whether petitioners were "participants" or "beneficiaries," the Eighth Circuit looked to this Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117 (1989). In that opinion, this Court held that to be considered a "participant," a former employee must have "a colorable claim to vested benefits." The Eighth Circuit ruled that petitioners did not have a colorable claim to vested benefits because their benefit claims were time-barred. Pet. App. A-8. They thus had no standing. *Id.* The Eighth Circuit noted that it had established an exception to this rule which applied if the fiduciary's breach of duty deprived plaintiff of participant status, but not if claimants lost participant status as a result of their own actions.[2/] *Id.* at A-8 - A-9.

2/ This exception was established by the Eighth Circuit in *Howe v. Varity Corp.*, 36 F.3d 746 (8th Cir. 1994), *cert. granted*, 63 U.S.L.W. 3771 (U.S. Apr. 24, 1995). This Court has granted certiorari in *Howe* to consider whether plan participants may obtain reinstatement of their retiree health insurance and restitution for unpaid benefits under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), or whether relief under that section can inure only to the plan. Although petitioners try to emphasize this aspect of *Howe* (*see* Pet. 11, 23-24), it has no bearing upon their petition. The Eighth Circuit dismissed petitioners' claims because they were not participants and thus lacked standing. The Court of Appeals relied upon *Howe* only to establish that there was an exception that applied if the fiduciary's breach of duty deprived plaintiff of participant status. The Court of Appeals did not base its decision upon, nor did it even discuss, the question in *Howe* which is under consideration by this Court. Petitioners themselves admit that the Court of Appeals did not address petitioners' entitlement to equitable relief under ERISA § 502(a)(3), the question presented in *Howe*. Pet. 11.

Since petitioners lost their status because they allowed their benefit claims to become time-barred, the exception did not apply.10/

REASONS FOR DENYING THE PETITION

I.

PETITIONERS' ARGUMENT THAT ERISA'S BREACH OF FIDUCIARY DUTY STATUTE OF LIMITATIONS SHOULD BE APPLIED TO ERISA BENEFIT CLAIMS IS NOT PROPERLY BEFORE THIS COURT, AND IS CONTRARY TO THE UNIFORM CONCLUSION AMONG THE COURTS OF APPEALS THAT THE MOST ANALOGOUS STATE STATUTE OF LIMITATIONS SHOULD BE APPLIED.

A. Because Petitioners Did Not Raise This Argument Below, And, In Fact, Asserted That The Most Analogous State Statute Of Limitations Should be Applied, This Question Is Not Properly Before This Court.

In both the District Court and the Court of Appeals, petitioners affirmatively asserted that ERISA

10/ As petitioners pointed out, there is some disagreement among the circuits as to whether this exception should exist. Pet. 11, n.3. Petitioners, however, have not sought review on this question, agreeing with the Eighth Circuit that the exception exists. They have chosen instead to challenge the Court of Appeals' ruling that the exception does not apply to petitioners under the unique facts of this case. Petitioners complain, for example, that the Court of Appeals did not address whether Armco's conduct triggered the exception. Pet. 11. In fact, the Eighth Circuit specifically concluded that petitioners were responsible for losing their participant status through inaction. Pet. App. A-9.

§ 502(a)(1)(B) benefit claims are governed by the most analogous state statute of limitations.[11] They thus proposed two Minnesota state statutes of limitations as alternatives to the wage claim statute ultimately adopted below.[12] Petitioners now abandon this position. In their petition, they directly contradict their prior legal arguments and assert for the first time that ERISA benefit claims should be governed by the statute of limitations for breach of fiduciary duty, ERISA § 413(a), 29 U.S.C. § 1113(a), not by the most analogous state statute of limitations.

Because petitioners never argued to either the District Court or the Court of Appeals that the ERISA breach of fiduciary duty statute of limitations should apply to their ERISA benefit claims, the lower courts did not decide that question. That issue, therefore, is not properly before this Court. "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Only in "exceptional cases" does the Court review a question not raised below, *Lawn v. United States*, 355 U.S. 339, 362-63 n.16 (1958). This is not such a case. Indeed, this principle should apply with even greater force here since petitioners

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11/ *See* Memorandum in Opposition to Defendant's Motion to Dismiss at 3; Brief of the Appellants Harold E. Adamson, et al. at 13.

12/ Petitioners advocated the adoption of either Minnesota's general statute of limitations for contract claims, Minn. Stat. § 541.05, subd. 1(1), or the statute of limitations applicable to liabilities created by statute, Minn. Stat. § 541.05, subd. 1(2).

advocated precisely the opposite position before the lower courts.

B. There Is Uniform Agreement Among The Courts of Appeals That The Most Analogous State Statute Of Limitations Should Be Applied To ERISA § 502(a)(1)(B) Benefit Claims.

The courts of appeals uniformly agree that since ERISA does not contain a statute of limitations applicable to ERISA § 502(a)(1)(B) benefit claims, courts should apply the most analogous state statute of limitations. *See Flanagan v. Inland Empire Electrical Workers Pension Plan & Trust*, 3 F.3d 1246, 1252 (9th Cir. 1993); *Meade v. Pension Appeals and Review Comm.*, 966 F.2d 190, 194-95 (6th Cir. 1992); *Gluck v. Unisys Corp.*, 960 F.2d 1168, 1180 (3rd Cir. 1992); *Kennedy v. Electricians Pension Plan, IBEW #995*, 954 F.2d 1116, 1120 (5th Cir. 1992); *Wright v. Southwestern Bell Telephone Co.*, 925 F.2d 1288, 1291 (10th Cir. 1991); *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237, 1242 (11th Cir. 1989); *Dameron v. Sinai Hosp. of Baltimore, Inc.*, 815 F.2d 975, 981 (4th Cir. 1987); *Jenkins v. Local 705 Int'l Broth. of Teamsters Pension Plan*, 713 F.2d 247, 251 (7th Cir. 1983); *Miles v. New York State Teamsters Conference Pension and Retirement Fund Employee Pension Benefit Plan*, 698 F.2d 593, 598 (2d Cir.), *cert. denied*, 464 U.S. 829 (1983).[13/]

13/ Armco is unaware of any First Circuit decisions discussing the statute of limitations applicable to ERISA § 502(a)(1)(B) benefit claims. A district court within that circuit has, however, followed the uniform rule. *See Teamsters Local 251 v. Teamsters, Chauffeurs, Warehousemen and Helpers Local 251*, 689 F. Supp. 48, 49 (D.R.I. 1988).

The courts of appeals that have specifically considered whether to apply ERISA's breach of fiduciary duty statute of limitations to ERISA benefit claims have consistently refused to do so. In *Flanagan v. Inland Empire Electrical Workers Pension Plan & Trust*, 3 F.3d 1246 (9th Cir. 1993), the Ninth Circuit concluded that the state contract statute provided a closer analogy than ERISA's breach of fiduciary duty statute. 3 F.3d at 1252. In *Kennedy v. Electricians Pension Plan, IBEW #995*, 954 F.2d 1116 (5th Cir. 1992), the Fifth Circuit found that Congress limited the application of ERISA § 413(a) to suits claiming breach of an ERISA trustee's fiduciary duty. 954 F.2d at 1120.

Contrary to petitioners' implication, the Tenth and Third Circuits follow the uniform rule. Petitioners claim that in *Held v. Manufacturers Hanover Leasing Corp.*, 912 F.2d 1197 (10th Cir. 1990), the Tenth Circuit indicated that it might wish to consider whether ERISA benefit claims should be governed by ERISA's breach of fiduciary duty statute of limitations. Pet. 16. The Court of Appeals in *Held*, however, followed *Wyoming Laborers Health & Welfare Plan v. Morgen & Oswood Constr. Co.*, 850 F.2d 613, 618 n.8 (10th Cir. 1988), applying the most analogous state statute of limitations and rejecting the statute of limitations contained in ERISA § 413(a). 912 F.2d at 1201-02. The Tenth Circuit has since reaffirmed this position. *Wright v. Southwestern Bell Telephone Co.*, 925 F.2d 1288, 1290-91 (10th Cir. 1991).

The Third Circuit also applies the most analogous state statute of limitations to ERISA benefit claims. The two Third Circuit cases cited by petitioners, *Adams v. Gould Inc.*, 739 F.2d 858 (3rd Cir. 1984), *cert. denied*, 469

U.S. 1122 (1985) and *Edwards v. Wilkes-Barre Publishing Co. Pension Trust*, 757 F.2d 52 (3rd Cir.), *cert. denied*, 474 U.S. 843 (1985), are not apposite. *Adams* was not an ERISA lawsuit. It was a *Vaca v. Sipes* action involving claims against plaintiff's union for breach of the duty of fair representation and against plaintiff's employer for breach of the collective bargaining agreement. 739 F.2d at 864-67. *See Vaca v. Sipes*, 386 U.S. 171 (1967). Although *Edwards* was an ERISA action, it involved breach of fiduciary duty claims, not benefit claims, and thus called for the application of ERISA's breach of fiduciary duty statute of limitations. 757 F.2d at 54-56. When faced with ERISA benefit claims, the Third Circuit has consistently applied the most analogous state statute of limitations. *See Gluck v. Unisys Corp.*, 960 F.2d 1168, 1180 (3rd Cir. 1992); *Vernau v. Vic's Market, Inc.*, 896 F.2d 43, 45 (3rd Cir. 1990); *Teamsters Pension Trust Fund of Philadelphia and Vicinity v. John Tinney Delivery Service, Inc.*, 732 F.2d 319, 322 (3rd Cir. 1984).[14/]

C. Where, As Here, Congress Has Not Provided A Statute Of Limitations, This Court Should Apply The Usual Rule And Conclude That ERISA Benefit Claims Are Governed By The Most Analogous State Statute Of Limitations.

This Court very recently considered whether a federal action that has no express limitations period should be governed by a state statute of limitations or a statute borrowed from another federal act. *North Star*

14/ Petitioners have acknowledged that these cases, which are directly on point, make no mention of either *Edwards* or *Adams*. Pet. 18-19 n.7.

Steel Co. v. Thomas, __ U.S. __, 63 U.S.L.W. 4465 (May 30, 1995) (considering the statute of limitations applicable to a claim under the Worker Adjustment and Retraining Notification Act ("WARN")). The Court adopted the most analogous state statute. 63 U.S.L.W. at 4467. In explaining its reasoning, the Court emphasized the presumption in favor of adopting state statutes of limitation where Congress has failed to provide a limitations period. 63 U.S.L.W. at 4466-67.

North Star Steel referred to many of the Court's prior statements advocating the adoption of the most analogous state statute of limitations. In *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), for example, this Court stated that "[i]t is the usual rule that when Congress has failed to provide a statute of limitations for a federal cause of action, a court 'borrows' or 'absorbs' the local time limitation most analogous to the case at hand." 501 U.S. at 355. Because the practice of borrowing state law is "longstanding," and because Congress is presumed to be aware of this practice, this Court has said that it "can generally assume that Congress intends by its silence that we borrow state law." *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 147 (1987). *See North Star Steel*, 63 U.S.L.W. at 4467.

"Rooted as it is in the expectations of Congress, the 'state-borrowing doctrine' may not be lightly abandoned." *Lampf*, 501 U.S. at 356. This Court has recognized a "closely circumscribed" and "narrow exception" to this general rule, but this exception applies only if the state limitations period frustrates or interferes with the purpose of the federal law. *North Star Steel*, 63 U.S.L.W. at 4467. The two year statute of limitations period adopted by the

Eighth Circuit does not frustrate the policies underlying ERISA. As the Court of Appeals concluded, the two year period affords plaintiffs "a realistic opportunity to assert ERISA benefit claims" and is thus not "at odds with federal policy." Pet. App. A-5, A-6. *See North Star Steel*, 63 U.S.L.W. at 4467 (finding that a two year period is not too short under WARN). As noted above, petitioners here knew or should have known of their claims well within two years of the cessation of benefits. *See supra* at 3-4.

Petitioners make no meaningful argument that the two year statute of limitations is contrary to federal policy.[15/] Instead, they attempt to apply the "hierarchical inquiry" found in *Lampf*. Pet. 12-16. It is unclear whether the *Lampf* methodology is still viable.[16/]

15/ Petitioners make a passing reference to federal policy in just two footnotes. Pet. 14, nn. 4, 5. In footnote 4, they criticize the Eighth Circuit for not adequately considering whether the two year statute is consistent with federal policy. As noted in the text above, however, the Eighth Circuit carefully considered this issue. In footnote 5, petitioners claim that both *Robbins v. Iowa Road Builders Co.*, 828 F.2d 1348 (8th Cir. 1987), *cert. denied sub nom. Robbins v. Easter Enterprises, Inc.*, 487 U.S. 1234 (1988) and *Trustees of Health Benefits Trust v. Lillard & Clark*, 780 F. Supp. 738 (D. Colo. 1990) rejected two year statutes because they hindered federal policy underlying ERISA. The Eighth Circuit itself corrected petitioners' mistaken impression of *Robbins* in its opinion below. Pet. App. A-5. As for *Lillard & Clark*, the court rejected the proposed two year statute primarily because it was hostile to and discriminated against claims based on federal law. 780 F. Supp. at 741.

16/ The *Lampf* "hierarchical inquiry" was supported by only four justices. Justice Scalia concurred in the judgment, but rejected the methodology adopted by the Court. 501 U.S. at 364-66. The Court's latest pronouncement on the issue in *North Star Steel* did not cite or apply the *Lampf* methodology.

Even if it is, petitioners' effort to fit themselves within the *Lampf* hierarchy fails.

The first *Lampf* factor asks whether a uniform statute of limitations should be selected. This factor focuses on whether the federal action encompasses "numerous and diverse" topics "such that a single state limitations period may not be consistently applied within a jurisdiction . . . ." 501 U.S. at 357, *quoting Wilson v. Garcia*, 471 U.S. 261, 273-75 (1985) (emphasis added). The concern is upon the need for "uniformity within each State." *Wilson v. Garcia*, 471 U.S. at 275. ERISA does not encompass "numerous and diverse" topics that would lead to the application of multiple statutes of limitation to the same type of claims. Once a state statute has been selected, it will apply to all such ERISA claims raised within that state.12/ *Wilson v. Garcia*, in stark contrast, involved § 1983 actions, claims that could be based upon a large variety of factual scenarios, thus opening the door to the application of "different statutes of limitations . . . to the various § 1983 claims arising in the same State." *Id.* at 274. Unlike *Wilson v. Garcia*, the facts upon which ERISA benefit claims are based are sharply circumscribed, and will not lead courts to apply multiple statutes of limitation within a state.

In an effort to satisfy this first *Lampf* factor, petitioners argue that the Eighth Circuit has applied different state statutes of limitations in different

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12/ Petitioners concede that there is uniform agreement among the courts of appeals that an ERISA § 502(a)(1)(B) claim for benefits should be characterized as a contract action. *See* Pet. 17-19. As the Eighth Circuit made clear, the wage claim statute that it selected was a specific type of contract statute of limitations. Pet. App. A-3.

circumstances. Pet. A-12 - A-14. Petitioners, however, fail to recognize that the Eighth Circuit has never applied multiple state limitations periods within a jurisdiction. Although both *Johnson v. State Mutual Life Assurance Co. of America*, 942 F.2d 1260 (8th Cir. 1991) and *Fogerty v. Metropolitan Life Ins. Co.*, 850 F.2d 430 (8th Cir. 1988) dealt with ERISA benefit claims in Missouri, *Johnson* did not add a second statute of limitations that could be applied to those claims. Instead, it overruled *Fogerty* and adopted a new Missouri statute applicable to all ERISA benefit claims, ruling that it had previously misapplied Missouri law. 942 F.2d at 1266. Petitioners next argue that the Eighth Circuit's decision in this case is inconsistent with its decision concerning Iowa law in *Robbins v. Iowa Road Builders Co.*, 828 F.2d 1348 (8th Cir. 1987), *cert. denied sub nom. Robbins v. Easter Enterprises, Inc.*, 487 U.S. 1234 (1988). Pet. A-13 - A-14. The Eighth Circuit, however, concluded that these opinions are in perfect harmony. Pet. App. A-5.[18/] Even if they were inconsistent, the Eighth Circuit still applied only one state statute of limitation for every state in which an ERISA benefits claim arose. There is therefore no justification for

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18/ The Eighth Circuit noted that *Robbins* involved an ERISA trustee's suit to collect delinquent plan contributions. Pet. App. A-5. The Circuit Court pointed out that such a suit "is not analogous to an employee's claim for benefits that are part of his or her total compensation." *Id.* Trustees may not know of the employer's breach for years. *Id.* Employees, in contrast, will immediately realize that the employer has failed to pay particular employment benefits. *Id.* Thus, while the wage claim statute of limitations was not appropriate in *Robbins*, it was highly appropriate in this matter. Any doubt about any inconsistency between this case and *Robbins* was resolved below, when the Eighth Circuit denied petitioners' suggestion for rehearing en banc.

concluding under *Lampf* that a uniform statute of limitations should be selected.

If the first *Lampf* factor is not satisfied, the inquiry ends. Even if it continued, petitioners cannot demonstrate that the uniform period should be derived from a federal source, the second *Lampf* factor. In *Lampf*, this Court stated that in making this judgment, the court should "accord particular weight to the geographic character of the claim . . . ." 501 U.S. at 357. Petitioners' argument with respect to this factor focuses almost exclusively upon the "danger" of forum shopping. Pet. 14-15. *North Star Steel*, however, stated that forum shopping was not a relevant consideration. 63 U.S.L.W. at 4467. Courts should instead consider whether the claim involves interstate transactions. *Id.* In ERISA benefit actions, as in the WARN actions at issue in *North Star Steel*, the claims usually involve single companies whose employees are affected in one state. There are no interstate transactions involving acts in several states, distinguishing ERISA § 502(a)(1)(B) causes of action from other actions that may require a uniform statute of limitations. *See Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 154 (1987) (noting that the predicate acts required to demonstrate a RICO claim will often occur in several states).

Finally, the third *Lampf* factor requires a determination whether an analogous federal source affords a "closer fit" with ERISA benefit actions than the state statute at issue. As noted above, several courts of appeals have concluded that ERISA's breach of fiduciary duty statute of limitations is limited to breach of fiduciary duty claims. *Flanagan v. Inland Empire Electrical Workers*

Pension Plan & Trust, 3 F.3d 1246 (9th Cir. 1993); *Kennedy v. Electricians Pension Plan, IBEW #995*, 954 F.2d 1116 (5th Cir. 1992). Claims against trustees for breach of fiduciary duty, the actions governed by ERISA § 413(a), encompass factual scenarios far removed from employee claims for benefits. State wage claim statutes of limitation, in contrast, apply to employee claims for remuneration, precisely the type of action involved in an ERISA § 502(a)(1)(B) claim. Accordingly, this *Lampf* factor also does not favor the adoption of ERISA's breach of fiduciary duty statute of limitations.

II.

PETITIONERS' ARGUMENT THAT THE STATE'S "RESIDUAL" OR GENERAL CONTRACT STATUTE OF LIMITATIONS SHOULD BE APPLIED TO ERISA BENEFIT CLAIMS IS NOT PROPERLY BEFORE THIS COURT, DOES NOT ARISE OUT OF A CONFLICT AMONG THE CIRCUITS, AND IS NOT SUPPORTED BY APPLICABLE LAW.

A. Because Petitioners Did Not Raise This Argument Below, This Question Is Not Properly Before This Court.

Petitioners' assertion that the state's "residual" or general contract statute of limitations should be uniformly applied to ERISA benefit claims, like petitioners' assertion urging adoption of ERISA's breach of fiduciary duty statute of limitations, was neither argued to nor considered by either the District Court or the Court of Appeals. Petitioners merely asserted below that ERISA benefit

claims are governed by the most analogous state statute of limitations, and proposed two Minnesota state statutes of limitations as alternatives to the statute adopted below.[19] Petitioners now abandon this position. In their petition, they assert for the first time that ERISA § 502(a)(1)(B) benefit claims should be governed by the state's "residual" or general contract statute of limitations, not by the most analogous state statute of limitations.[20] Because petitioners did not address this argument to either the District Court or the Court of Appeals, it is not properly before this Court. *See supra* at 9-10.

B. No Court of Appeals Decisions Support The Uniform Adoption Of A "Residual" Or General Contract Statute Of Limitations.

As noted above, every court of appeals which has considered which statute of limitations to apply to ERISA § 502(a)(1)(B) benefit claims has applied the most analogous state statute. *See supra* at 10. No court of appeals has imposed a rule requiring the adoption of a state's "residual" or general contract statute of limitations.

Although the circuit courts are therefore in agreement on this issue, petitioners argue that there is a split among the circuits, stating that most courts of appeals have characterized ERISA benefit claims as contract actions, while the Third, Eleventh and Eighth Circuits

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19/ *See supra* at n.12.

20/ Petitioners themselves concede that one of the state statutes it advocated, Minn. Stat. § 541.05, subd. 1(2), is not properly considered a "residual" statute of limitations. Pet. 19, n.8.

have looked instead to state wage claim statutes. The adoption of different state statutes by the courts of appeals, of course, does not reflect a split among the circuits. It is merely a natural outgrowth of this Court's admonition that where there is no federal statute of limitations, courts should chose the most analogous state statute.

The circuit court decisions, moreover, are in harmony. In each case, the courts of appeals considered which state statute was most analogous to an ERISA claim for benefits and adopted the most appropriate contract statute of limitations. Where there was only one contract statute of limitation available, the courts borrowed that statute. *See, e.g., Dameron v. Sinai Hosp. of Baltimore, Inc.*, 815 F.2d 975 (4th Cir. 1987); *Miles v. New York State Teamsters Conference Pension and Retirement Fund Employee Pension Benefit Plan*, 698 F.2d 593 (2d Cir.), *cert. denied*, 464 U.S. 829 (1983). Where there was more than one contract statute of limitations available, the courts selected the most closely analogous. In many cases, that happened to be the contract statute applicable to actions on written contracts.[21/] *See, e.g., Meade v. Pension Appeals and Review Comm.*, 966 F.2d 190, 194-95 (6th Cir. 1992); *Jenkins v. Local 705 Int'l Broth. of Teamsters Pension Plan*, 713 F.2d 247, 251 (7th Cir. 1983). When given the opportunity to choose even more specific contract statutes applicable to actions for wages, those statutes were

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21/ Petitioners can hardly contend that these statutes of limitation are "residual" or general contract statute of limitations.

selected.[22] *See Clark v. Coats & Clark, Inc.*, 865 F.2d 1237 (11th Cir. 1989);[23] *Teamsters Pension Trust Fund of Philadelphia and Vicinity v. John Tinney Delivery Service, Inc.*, 732 F.2d 319 (3rd Cir. 1984).[24]

Petitioners try to demonstrate that there is a conflict within the Eighth Circuit by arguing that the court used Iowa's general contract statute of limitations in *Robbins v. Iowa Road Builders Co.*, 828 F.2d 1348 (8th Cir. 1987), *cert. denied sub nom. Robbins v. Easter Enterprises, Inc.*, 487 U.S. 1234 (1988), but rejected Missouri's general residual statute in *Johnson v. State Mutual Life Assurance*

22/ The courts of appeals which have adopted the general contract statutes of limitation or the statute applicable to written contracts were not given the choice of selecting a more specific wage claim statute of limitations. If they had been given that choice, they would have undoubtedly chosen the wage claim statute. A wage claim is, after all, a specific type of contract action closely analogous to an ERISA benefit claim. Choosing a more specific and more analogous statute of limitations where that option is presented is consistent with choosing the general contract statute where no such option exists.

23/ Petitioners point out that the Eleventh Circuit in *Clark* applied the wage claim statute, instead of the more general statute governing actions upon written contracts, to an ERISA claim for past wages. Pet. 19. In the same case, the court of appeals applied to plaintiff's equitable claim for reinstatement a statute governing the equitable enforcement of statutory rights. 865 F.2d at 1242. In both instances, the court applied the most analogous state statute to plaintiff's ERISA claims.

24/ Petitioners erroneously allege that the Third Circuit "noted" in *Vernau v. Vic's Market, Inc.*, 896 F.2d 43 (3rd Cir. 1990) that this issue should perhaps be reconsidered. Pet. 18. *Vernau* merely expressed, in a footnote, one judge's opinion that the court "may wish" to reconsider *Tinney*. *Vernau*, 896 F.2d at 45, n.3. *Vernau*, in fact, applied *Tinney* to the facts in that case. It should also be noted that one of the *Tinney* panel members, the Honorable Joseph F. Weis, Jr., Senior Circuit Judge of the Third Circuit, sat by designation in the Eighth Circuit panel below.

Co. of America, 942 F.2d 1260 (8th Cir. 1991). Pet. 19-20. As an initial matter, the court in *Robbins* chose the statute of limitations applicable to actions for breach of written contracts, not some "residual" or general statute. 828 F.2d at 1355. More importantly, both cases merely represented the court's application of the general rule requiring it to choose the most analogous state statute.

C. This Court Should Not Require The Uniform Adoption Of General Or Residual Contract Statutes Of Limitations.

In *North Star Steel*, this Court emphasized the strong presumption in favor of adopting the most analogous state statutes of limitations where Congress has failed to provide a limitations period. *North Star Steel*, 63 U.S.L.W. at 4466-67. There is no justification for departing from that established practice here.

"Catch all" or residual statutes have been adopted only in very limited circumstances to resolve problems not present in this case. *Owens v. Okure*, 488 U.S. 235 (1989), one of the two cases relied upon by petitioners, grew out of a problem first addressed in *Wilson v. Garcia*, 471 U.S. 261 (1985). In *Wilson*, this Court confronted the "conflict, confusion, and uncertainty" regarding the statute of limitations governing § 1983 actions. *Id.* at 266. That conflict had arisen because almost every § 1983 action could be analogized to more than one common-law form of action. *Id.* at 272-73. In addition, § 1983 claims encompassed "numerous and diverse topics and subtopics . . . ." *Id.* at 273. As a result, different statutes of limitations were being applied to various § 1983 actions arising in the same state.

Id. at 274. To obtain "uniformity within each State," the Court held that personal injury statutes of limitations should be uniformly applied to all § 1983 claims. *Id.* at 275, 276. This, however, did not resolve the problem. Many states had numerous personal injury statutes of limitations, leading to continued confusion and inconsistency within states. This Court therefore held in *Owens* that courts should borrow the "residual or general" personal injury statutes of limitations for § 1983 actions.

Reed v. United Transportation Union, 488 U.S. 319 (1989) followed closely on the heels of *Owens*. This Court's primary focus in *Reed* was whether the petitioner's claim should be governed by the National Labor Relations Act § 10(b) statute of limitations or by state personal injury statutes. After concluding that the state personal injury statutes of limitations should apply, this Court, without further analysis, cited *Owens* and adopted the "residual or general" statute of limitations applicable to personal injury actions. *Id.* at 323, 326-27.

This Court has therefore applied residual or general statutes of limitation only to a few broad causes of action which could be analogized to more than one personal injury statute of limitations, and which encompass "numerous and diverse topics," each of which implicates a different set of personal injury statutes. *See Owens*, 488 U.S. at 250 n.12.

This action clearly does not fall within this narrow class of cases. Petitioners concede that ERISA § 502(a)(1)(B) benefit claims are analogous to contract actions, not personal injury actions. Moreover, once a state statute has been selected, it will apply to all such ERISA claims raised within that state. Unlike *Wilson v. Garcia*,

the facts upon which ERISA benefit claims are based are sharply circumscribed, and will not implicate multiple statutes of limitations depending on the facts alleged by plaintiffs.25/

III.

THE COURT OF APPEALS PROPERLY AFFIRMED THE DISMISSAL OF PETITIONERS' CLAIMS FOR BREACH OF FIDUCIARY DUTY ON THE GROUND THAT PETITIONERS LACKED STANDING TO SUE AS "PARTICIPANTS" OR "BENEFICIARIES" BECAUSE THEIR BENEFIT CLAIMS WERE TIME-BARRED.

The parties to this action have not found another court of appeals or district court opinion deciding whether employees whose ERISA benefit claims are barred by the statute of limitations nonetheless have standing as participants or beneficiaries to allege a breach of fiduciary duty. The absence of precedent indicates how narrow and unimportant this question truly is. It may never arise again, a consideration that strongly argues against granting certiorari. If other circuit courts do confront this question in the future, there is every reason to believe that they will agree with the Eighth Circuit.

25/ There is also no inconsistency among the circuits with respect to ERISA benefit claims, unlike the situations presented in *Wilson*, *Owens* and *Reed*. *See Reed*, 488 U.S. at 323; *Owens*, 488 U.S. at 241-42; *Wilson*, 471 U.S. at 266. Every court of appeals that has considered which statute of limitations to apply to ERISA benefit claims has applied the most analogous state statute, and ultimately adopted a contract statute of limitations. *See supra* at 10, 20-21.

There is, in addition, no reason to question the Eighth Circuit's ruling. ERISA § 502(a)(2) and (a)(3), the statutory basis for petitioners' breach of fiduciary duty claims, allow "participants" or "beneficiaries" to bring civil actions for breach of fiduciary duties. ERISA defines a "participant" as an employee or former employee "who is or may become eligible to receive a benefit" from an ERISA plan. 29 U.S.C. § 1002(7). A "beneficiary" is a person designated by a participant, or by the terms of an employee benefit plan, "who is or may become entitled to a benefit" under the plan. 29 U.S.C. § 1002(8). Interpreting this statutory language, this Court has held that to be considered a "participant," a former employee must have "a colorable claim to vested benefits." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117 (1989). To establish that "he or she 'may become eligible' for benefits, a claimant must have a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." *Id.* at 117-118.

Petitioners cannot satisfy this test. Because they failed to bring suit within the time permitted by the statute of limitations, petitioners did not have and could not have a "colorable claim" that they "will prevail in a suit for benefits." Petitioners' claims for benefits are time-barred. Petitioners, therefore, were not and could not become "participants" or "beneficiaries" under the *Firestone* test, and lack standing to assert breach of fiduciary duty claims.

Although other courts of appeals have not considered this precise question, it has been well established both in *Firestone* and in numerous circuit court decisions that if plaintiffs are not entitled to receive

benefits, they are not participants or beneficiaries and have no standing to allege ERISA claims. *See, e.g., Curtis v. Nevada Bonding Corp.*, 53 F.3d 1023 (9th Cir. 1995); *Shawley v. Bethlehem Steel Corp.*, 989 F.2d 652 (3rd Cir. 1993); *Sallee v. Rexnord Corp.*, 985 F.2d 927 (7th Cir. 1993). This logic applies to all ERISA claims, including the breach of fiduciary duty claims alleged by petitioners.

Petitioners wrongly assume that the Eighth Circuit applied a state statute of limitations to bar federal ERISA claims, violating ERISA's preemption provision. Pet. 21-22. In adopting state statutes of limitations where Congress has failed to provide a limitations period, courts act as a matter of federal law. The statute of limitations that they derive may be borrowed from the states, but it is a federal limitations provision. Thus, ERISA's preemption clause, which preempts only state law, is not applicable.

Petitioners also err in arguing that the Eighth Circuit's standing decision was improper in light of the separate statute of limitations for breach of fiduciary duty claims. ERISA § 413, 29 U.S.C. § 1113. Before employees are permitted to assert any ERISA claim under § 502(a)(2) or (a)(3), including claims for breach of fiduciary duty, they must prove that they are "participants" or "beneficiaries." This is a threshold requirement, mandated by clear statutory language, which all employees must satisfy before asserting ERISA claims. Once that threshold is passed, courts will apply the 29 U.S.C. § 1113 statute of limitations to determine whether the participants have timely asserted their breach of fiduciary duty claims. In this case, petitioners failed to pass the threshold. They therefore cannot assert their claims.

Petitioners' final effort to salvage their breach of fiduciary duty claims is based upon an exception to the standing requirement recognized by the Eighth Circuit. Pet. 23-24. Under this exception, plaintiffs may allege ERISA claims, even if they are not participants, if they lost their participant status because of defendant's breach of fiduciary duty. *Id.* Petitioners claim that the Eighth Circuit wrongly concluded that they did not fall within that exception. *Id.* This argument is not worthy of review on a writ of certiorari since it is based upon the unique facts and circumstances of this case.[26/] The Eighth Circuit found that in this case, petitioners themselves, not Armco, were responsible for their loss of participant status. Pet. App. A-9 - A-10. The panel thus concluded that the standing exception does not apply here.[27/]

26/ The standing exception to which petitioners refer was established by the Eighth Circuit in *Howe v. Varity Corp.*, 36 F.3d 746 (8th Cir. 1994), *cert. granted*, 63 U.S.L.W. 3771 (U.S. Apr. 24, 1995). As noted above, this Court has granted certiorari in *Howe* to consider questions unrelated to this standing exception. *See supra* at 7 n.9.

27/ Petitioners argue that Armco is responsible because Armco allegedly concealed the nature of its relationship with Reserve. Nothing, however, was hidden. Moreover, even if petitioners were unaware of Armco, they had two years to investigate their claims after their benefits stopped. Their failure to do so was their responsibility, not Armco's. *See* Pet. App. A-9 - A-10.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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